(1) Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Nancy Welz, George McShane,
Daniel Sherry, Stephen Yellico,
William E. Waugh, Lola Yellico.
Raymond L. Mylott, Jr.,
Edward Green, Gerald Lehmann,
William Draghi,
Pro se Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK
Respondents.

Petition For Writ Of Certiorari To The Appellate of the Supreme Court of The State of New York for the Ninth and Tenth Judicial Districts

PETITION FOR WRIT OF CERTIORARI

Nancy Welz, George McShane,
Daniel Sherry, Stephen Yellico,
William E. Waugh, Lola Yellico,
Raymond L. Mylott, Jr.,
Edward Green, Gerald Lehmann,
William Draghi, Pro se
Petitioners

264 pp

A. QUESTION PRESENTED FOR REVIEW

In the words of Dr. Martin Luther King in his "I Have A Dream" speech at the Washington Monument, will this nation finally "rise up and live up to its creed that all men are created equal" and put an end to the government sanctioned infanticide of allowing innocent American babies in the womb to be unjustly murdered without due process of law and equal protection of the law in violation of their natural and constitutional right to life from the moment of creation?

B. PARTIES

Nancy Welz
George McShane
Daniel Sherry
Stephen Yellico
William E. Waugh
Lola Yellico
Raymond L. Mylott, Jr.
Edward Green
Gerald Lehmann
William Draghi (three cases)
The Westchester County District Attorney's Office, N.Y.

C. TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED----------	I
PARTIES----------	ii
TABLE OF AUTHORITIES----------	v
DECISIONS BELOW----------	2
JURISDICTION----------	2
STATEMENTS OF THE CASES----------	3
REASONS FOR GRANTING THE WRIT----------	25
I. Harvard Medical School Brief Reasons----------	25
II. Genetic Reasons----------	25
III. Constitutional Reasons----------	26
IV. Roe v. Wade Considerations----------	27
CONCLUSION----------	30
APPENDICES:	
A. Orders, New York State Court of Appeals (May 6, 1996) ----------	1
B. Orders, Decisions, Supreme Court of State of New York Appeals for the 9th and 10 th Judicial Districts (April 15, 1996) ----------	8
C. Companion Cases ----------	23
D. No Rehearing ----------	none
E. Judgments and Opinions Are Same Dates-------	none
F. Quotes of Statues and Authorities----------	24
G. Federal Questions Raised on the Record -------	33

H. Other Material Essential To Understand Petition Raised

1). OPINION, Municipal Court of New Jersey (April 29, 1991)---------- 33

2) Opinion, District Court, Sedgewick County, Kansas (Jan 20, 1992) ---------- 76

3) Opinion, Criminal Court, New York County, N.Y. (Jan 20, 1992)---------- 118

4) Human Life Proclamation---------- 181

5) Hippocratic Oath (460- 357 B.C.) ---------- 186

6) Preamble of the U.S. Constitution ---------- 186

7) Article 5, 9 & 14 Amendments to the U.S.-- 187 Constitution

8) Declaration of Independence (July 4, 1776)--188

10) Federalist Papers (Jan 4, 1788, & other dates from same period)---------- 197

TABLE OF CITED AUTHORITIES

We hold these truths to be self evident that all men are created equal and are endowed by their Creator with certain inalienable rights, that among these are the right to life, liberty, and the pursuit of happiness.

Natural Law

Man's participation in God's Eternal Law

God's Eternal Law

The laws of nature and science that govern the universe and God's creatures

God's Revealed Law

The Ten Commandments, Exodus 20:13

The Fifth Commandment, Thou Shalt Not Kill

Do not hesitate to rescue those about to be unjustly killed. Proverbs 24:11

The Didache, the first writing of the Early Church that condemned abortion

Abortion and the Early Church; Christian, Jewish, and Pagan Attitudes in the Greco-Roman World, by Michael J.Gorman,Paulist Press, 1982

Cicero, An unjust law is no law.

Sophocles' Antigone, God's laws are higher than man's laws.

The Common Law

Blackstone's Commentaries on the Common Law

The U.S. Constitution

The Preamble, the right to defend life starting at the moment of its creation

The Fifth Amendment Due Process Clause and Implied Equal Protection Clause

The Fourteenth Amendment Due Process and Equal Protection Clauses

The Ninth Amendment

The Federalist Papers

The U.S. Constitution based on the law of nature and of nature's God, Federalist Paper No. 43 by James Madison, drafter of the U.S. Constitution

The right to defend life, Federalist Paper No. 28 by Alexander Hamilton, and Federalist Paper No. 43 by James Madison (right of self preservation)

The Justification Defense, embodied in the Summa Theologiae by Saint Thomas Aquinas and New York State Penal Law Section 35.05(2) and People v. John Gray, et al., New York County Criminal Court, Jury Part 10, decision by Judge Espinoza, reported in the New York Law Journal, March 25, 1991, p. 26.

Article I of the Constitution of the State of New Jersey The right to defend life President Ronald Regan's January 14, 1988 Presidential Proclamation that human life must be proctected starting at the moment of its creation

I Am Roe: My Life, Roe v. Wade, and Freedom of Choice by Norma McCorvey with Andy Meisler, N.Y., Harper Collins, Publishers, 1994.

Roe v. Wade, by Marian Faux, a Mentor Book, published by Penguin Books USA Inc., N.Y., N.Y., 1989

Justice At Nuremberg

The Right to Life A natural right The doctrine on which this nation was founded Implied in the U.S. Constitution implied in the Preamble In the Fifth Amendment Due Process Clause In the right to equal protection of the law implied in the Fifth Amendment In the Fourteenth Amendment Due Process and Equal Protection Clauses In the Ninth Amendment

The Right to Life From the Moment of Creation

The self evident truth that all men are created equal, so all rights attach at creation

Personhood arises at creation, when the 23 chromosome male sperm unites with the 23 female egg creating a 46 chromosome human person with its genetic package intact and its DNA code locked in

forever

Fifth Amendment Due Process Clause and implied Equal Protection Clause attach

Fourteenth Amendment Due Process Clause and Equal Protection Clause attach

Ninth Amendment attaches

The Right to Defend Life A natural right

In the Preamble of the U.S. Constitution The Right to Defend Life Starting At the Moment of Its Creation

We hold these truths to be self evident that all men are created equal and are endowed by their Creator with the inalienable right to life

The Preamble of the U.S. Constitution

President Ronald Regan's January 14, 1988 Presidential Proclamation that human life must be protected starting at the moment of its creation

The Right to Privacy

A natural right Implied in the U.S. Constitution, under right not to be searched without probable cause

The Right to Privacy From the Moment of Creation

The self evident truth that all men are created equal, so all rights attach at creation

Fifth Amendment implied Equal Protection Clause

Fourteenth Amendment Equal Protection Clause

Byrn v. New York City Health and Hospitals Corp.(New York State Court of Appeals, 1972), 31 N.Y. 2d 194, 335 N.Y.S. 2d 390, to the extent it holds that individual human life begins at the moment of creation, and the dissents to the main opinion

Papal Encyclical Humanae Vitae, by Pope Paul VI

Papal Encyclical Evangelium Vitae, by Pope John Paul II

Corfield v. Coryell, Fed. Cas. No. 3,230, 4 Wash. C.C.371, stating that some rights are so fundamental, they do not depend on any document

People v. John Gray, et al., New York County Criminal Court, Jury Part 10, decision by Judge Espinoza, reported in the New York Law Journal, March 25, 1991, p. 26, setting forth the criteria for the application of the Justification Defense under New York State Penal Law Section 35.05(2)

Medical Brief submitted Amicus Curiae in Roe v. Wade by doctors from the Harvard Medical School, the Mayo Clinic, et al., stating the baby is a person at the moment of creation and the Equal Protection and Due Process Clauses of the U.S. Constitution attach at the moment of creation

Davis v. Davis v. King, d/b/a Fertility Center of East Tennessee (the Tennessee Frozen Embryo Case), No. E-14496, Sept. 21, 1989 decision by the Circuit Judge W. Dale Young, Circuit Court for Blount County, Tenn. at Maryville,

Equity Division (Div. I)

State of New Jersey v. Alexander Loce, et al., April 29, 1991 decision by Judge Michael J. Noonan, Municipal Court of New Jersey, Law Division, Morris County, Criminal Action, Docket No. c1771, et seq.

City of Witchita v. Elizabeth A. Tilson, No. 91 MC 108, July 20, 1992, Memorandum Opinion by Judge Paul W. Clark, in the Criminal Department of the District Court for the Eighteenth Judicial District, Sedgwick County, Kansas

May It Please The Court, The Most Significant Oral Arguments Made Before The Supreme Court Since 1955, Edited by Peter Irons and Stephanie Guitton, published by The New Press, N.Y., 1993, distributed by W. W. Norton & Co., Inc.

AUTHORITIES CRITICISED

Roe v. Wade, 410 U.S. 113 (1973)
Doe v. Bolton, 410 U.S. 179 (1973)

Their progeny, purportedly allowing abortion to continue

N.Y. State statute, Penal Law 125.05, purportedly allowing abortion

People v. Craig, 78 N.Y.2d 616, 578 N.Y.S.2d 47

That part of Byrn v. New York City Health and Hospitals Corp. (N.Y. Court of Appeals, 1972) 31 N.Y.2d 194, 335 N.Y.S.2d 390, that claims that under a right to privacy a mother has the right to kill her baby in the womb

The U.S. Second Circuit Court of Appeals decision in New York N.O.W. v. Randall Terry, 886 F.2d 1339(2nd Cir. 1989) that claims that under the Commerce Clause of the U.S. Constitution that a mother can cross state lines to kill the baby in her womb

The F.A.C.E. statute, 28 U.S.C. 248, and similiar statutes passed by the N.Y. City Council, etc. purportedly prohibiting anyone from defending the life of a baby about to be aborted

Any injunction or purported protective order, state, federal, or local, purportedly prohibiting anyone from defending the life of a baby about to be aborted

The U.S. Court of Appeals decision in Oregon purportedly allowing assisted suicide, citing reasoning stemming from the progeny of Roe v. Wade and Doe v. Bolton

The Executive Order by President Clinton in the opening days of his administration purportedly allowing the use of body parts and tissue from aborted babies for medical experimentation and other purposes

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(addresses can be found on page 219 of appendix)

LOWER COURT DECISIONS WERE NOT PUBLISHED

BASIS FOR U.S. SUPREME COURT JURISDICTION

i. Date of entry of judgment sought to be reviewed N..Y. State Court of Appeals decisions dated May 6, 1996 denying leave to appeal to the New York State Court of Appeals

ii. There was no order for rehearing
There was no request for extension of time to file petition

iii. There was no cross petition

iv. The statutory provision conferring jurisdiction on the U.S. Supreme Court is 28 U.S. Code Section 1257

v. Notifications:
New York State Attorney General 120 Broadway, New York, New York regarding the N.Y. State statute purportedly allowing abortions, 28 U.S.C. §2403(b) may apply

STATUTES AND AUTHORITIES CITED (see Appendix)

STATEMENT OF THE CASES

People v. Nancy Welz

At the very beginning of the Nancy Welz case, a written motion was made that if the burden of proof shifted at the end of the prosecution's case, the defendant intended to assert the right to defend life defense under the U.S. Constitution, and the justification defense under Penal Law Section 35.05 (2) of the State of New York. Nancy Welz was charged with trespass under Section 140.05 of the Penal Law of the State of New York, a violation, for having allegedly blocked the doors of the abortion clinic at 88 Ashford Avenue, Dobbs Ferry, New York on the morning of April 3, 1993. The motion to assert the right to defend life defense and the justification defense was denied. The defendant was apparently only charged with a violation because when the Westchester D.A.'s office used to charge a misdemeanor in these types of cases, the defendant was entitled to a jury trial, and the jury often acquitted in the past.

The Nancy Welz case was the last of the cases in this present group to be

tried. The scheduling book containing the scheduled appointments for the date of the alleged arrest at the abortion clinic was subpoenaed by the defense to be present at the trial. It was not honored and the trial court did nothing to enforce it at the trial on March 10, 1994. This was the last of the cases to be tried in this group of Dobbs Ferry Right to Life Cases. The prosecution apparently learned from its mistakes in the previous trials in not having Dr. Kaali, the abortionist and owner of the abortion clinic testify. Dr. Kaali was a witness for the prosecution in this case. But the prosecution still made a serious error. Dr. Kaali was asked in cross examination if he brought the scheduling book for the date of the alleged arrest. He said no. When he was asked if he knew the name of the defendant in this case, he answered no. The defense moved to dismiss on the grounds that the prosecution could not prove that the defendant did not have an appointment and did not have a right to be on the premises. The case should have been dismissed at that point. The prosecution tried to resuscitate its case by having Dr. Kaali then testify, after it was already too late, that Dr. Kaali withdrew any permission that anyone had to be on the property and told the police to remove everyone. This, of course, was not within

the power of Dr. Kaali to do. He had no right to have the police remove anyone who was exercising their right under the U.S. Constitution to defend the lives of babies about to be aborted. Any order to leave was unconstitutional as a denial to the defendant of the right to defend life and to the babies of their right to life. The motion to present the right to defend life defense and the justification defense was renewed at the end of the prosecution's case. It was denied. Defendant was found guilty and was sentenced to 15 days incarceration and was ordered to stay away from the abortion clinic for 1 year. This order to stay away was null and void as a violation of the defendant's right to defend the lives of the babies about to be aborted. The surrender date for incarceration was adjourned to give the defendant a chance to get a stay pending appeal to the Appellate Term. Justice West of the New York State Supreme Court, Westchester County, granted the stay pending the appeal. The stay was extended by the Appellate Term. The appeal of all these cases was heard by the Appellate Term. All the technicalities were argued , as well as the right to life from the moment of creation, the right to defend life as a basic fundamental right and as a right under the U.S. Constitution and the justification defense under New York

State Penal Law Section 35.05 (2). The Appellate Term decision stated that in the interests of justice in the exercise of discretion the defendant's jail sentence was modified down to 5 days incarceration, and as so modified, was affirmed. This was an illegal decision, as the Appellate Term could not legally march the defendant off to jail for exercising the constitutional right to defend the lives of the babies about to be aborted who had the right to life from the moment of creation. As the Appellate Term modified the jail sentence and ordered corrective action that was illegal, the N.Y. State Court of Appeals had the power to take the case on appeal. But the N.Y. State Court of Appeals in effect took the position that because the Appellate Term used the words "in the interest of justice in the exercise of discretion" the Court of Appeals did not have the power to review an exercise of discretion, but only a matter of law. The Court of Appeals refusal to accept this case on appeal erroneously stated that the decision by the Appellate Term did not involve a matter of law that should be reviewed by the Court of Appeals. This was erroneous, because a matter of law was involved - the most important matter of law in this nation - the fundamental right to life from the moment of creation and the right

to defend that life. In fact, the Appellate Term decision in the Nancy Welz case cited **People v. Craig, 78 N.Y.2d 616,** 578 N.Y.S.2d 47, the New York State Court of Appeals decision which denied the justification defense in anti abortion cases, which was unconstitutional anyway as a denial of Equal Protection of the Laws. So the Appellate Term was deciding these cases as a matter of law, but erroneously, as it is a denial of the Constitutional Right to Equal Protection of the Laws to deny the justification defense only to defendants in anti abortion cases and not to deny it to other defendants. The Court of Appeals should have looked beyond the words used on the face of the Appellate Term decision and looked to the substance of what the Appellate Term was doing in deciding the appeal - violating a constitutional right, in ordering illegal corrective action. The U.S. Supreme Court should grant the application for the writ of certiorari.

People v. William Draghi Alleged Disorderly Conduct
July 31, 1993
People v. William Draghi Alleged Violation of Protective
Order, October 9, 1993
People v. William Draghi Alleged

Violation of Protective
Order, July 31, 1993

Procedurally these cases got to the U.S. Supreme Court in this manner. William Draghi was charged with Disorderly Conduct for having allegedly blocked the doors on July 31, 1993 to the abortion clinic at 88 Ashford Avenue in Dobbs Ferry, N.Y. He was charged by the Office of the District Attorney of Westchester County, N.Y. under New York State Penal Law 240.20 with Disorderly Conduct which is a violation.

At the very beginning of this case, a written motion was made on Mr. Draghi's behalf asserting that if the burden of proof would shift at the end of the prosecution's case at trial, then Mr. Draghi had the right as a basic fundamental right and as a right under the U.S. Constitution to defend the lives of the babies about to be killed by abortion at the abortion clinic, which babies had the right to life from the moment of creation as a basic self evident Creator endowed fundamental inalienable right, as it is self evident that all men are created equal, and as a right under the U.S. Constitution, as the baby is a person at the moment of creation when the 23 chromosome male sperm unites with the 23 chromosome female egg, and a 46 chromosome

human person comes into existence, which 46 chromosomes and the way they link up structurally defines a human person. At that moment of creation the genetic package of that person is intact and its DNA code locks in forever identifying it as that human person and none other for all eternity. The motion made at the very beginning of the case also asserted Mr. Draghi's right to defend life under Article I of the New Jersey Constitution, as he is a citizen of the state of New Jersey, and the right to assert the justification defense under Section 35.05(2) of the Penal Law of the State of New York, if the burden of proof shifted at the end of the prosecution's case. Attached to the motion papers below was a copy of the Yellow Pages advertisement proving that abortions are performed at the abortion clinic and a copy an excerpt from the D.A.'s brief from a prior case proving abortions are performed at the abortion clinic at 88 Ashford Avenue in Dobbs Ferry. Also attached to the motion were three decisions, **Davis v. Davis v. King**, **d/b/a Fertility Center of East Tennessee**, No. E-14496, Sept. 21, 1989 decision by the Circuit Judge W. Dale Young, Circuit Court for Blount County, Tenn. at Maryville, Equity Division (Div. I), the Tennessee Frozen Embryo case, **State of New Jersey v. Alex Loce, et al,**

April 29, 1991 decision by Judge Michael J. Noonan, Municipal Court of New Jersey, Law Division, Morris County,Criminal Action, Docket No. C1771, et seq., also **City of Wichita v. Elizabeth A. Tilson,** No.91 MC 108, July 20, 1992, Memorandum Opinion by Judge Paul W. Clark, in the Criminal Department of the District Court for the Eighteenth Judicial District, Sedgwick County, Kansas, all quoting the world famous embryologist Dr. Jerome LeJeune as to how the link up of the 46 chromosomes at the moment of creation creates a human person with its genetic package intact at the moment of creation, and how the DNA code locks in at the moment of creation identifying that person for all eternity.

Mr. Draghi had another case, having been arrested on October 9, 1993 for allegedly blocking the doors to the abortion clinic at 88 Ashford Avenue. He was represented by attorney John Broderick and went through a so called stipulated facts trial, at the end of which he was found guilty and sentenced to incarceration, which jail sentence he served. He then received notice in the mail that he was being charged with allegedly violating an order to stay away from the abortion clinic for that October 9, 1993 arrest. A motion was filed on behalf of Mr. Draghi in that case charging

him with violation of the protective order asserting that if the burden of proof shifted in that case, then the protective order was null and void as he had the right to defend the lives of the babies about to have been aborted at the abortion clinic as a basic fundamental human right and as a right under the Preamble of the U.S. Constitution, and the babies had the self evident Creator endowed inalienable right to life from the moment of creation as it is self evident that all men are created equal, and as a right under the U.S. Constitution from the moment of creation when the male sperm united with the female egg creating a 46 chromosome human person, and their genetic package was intact and their DNA code locked in forever.

On the date of trial for these two charges Assistant District Attorney Susan Costabile informed Mr. Draghi that he was being charged with a new third charge, having allegedly violated an order of protection on July 31, 1993, the date of the arrest on his disorderly conduct charge, for allegedly blocking the entrance to the abortion clinic. Mr. Winnemore, Mr. Draghi's attorney, informed the Court that he wanted the opportunity to submit a motion on this new third charge of allegedly violating a so called protective order, asserting that Mr.

Draghi had the right to defend the lives of the babies about to be have been aborted, and any protective order was null and void as a violation of Mr. Draghi's right to defend human life and of the babies' right to life from the moment of creation. At trial and on appeal it was asserted by the defense that Mr. Draghi was entitled to a jury trial on the charges of alleged violation of the protective order. That issue is before this U.S. Supreme Court on appeal, as well as other issues, but most especially the right of the babies about to be aborted to life from the moment of creation and Mr. Draghi's right to defend that life.

The Appellate Term reduced Mr. Draghi's 195 day jail sentence to 55 days, stating that it was doing so in the exercise of discretion in the interests of justice. The New York State Court of Appeals by Judge Simons declined to take the case on appeal, stating that it was not a matter of law. But it was the most important matter of law in this nation that should have been considered - that all men are created equal, that they have the right to life from the moment of creation. Mr. Draghi had the right to defend that life. The Appellate Term, in the sister case to Mr. Draghi's, People v. Nancy Welz, cited the New York State Court of Appeals decision in **People v. Craig**,

supra, denying defendants in anti-abortion cases the justification defense. So Mr. Draghi's case was decided on the basis of law, and erroneously, for to deny only those defendants trying to protect human life starting from the moment of its creation of the justification defense, when it is effectively allowed to all other defendants who otherwise meet the criteria for the defense, is a denial of Equal Protection of the Laws and is unconstitutional, and is a denial to the babies about to be aborted of their constitutional and self evident Creator endowed and inalienable right to life.

Stays in the execution of sentence have been granted all the way up to the Appellate Term. When the Court of Appeals declined to accept the cases, it denied the request for the stay as academic.

People v, George McShane, Daniel Sherry, and Stephen Yellico

Procedurally this case arrived at the U.S. Supreme Court in the following manner.

At the very beginning of this case, these three defendants, along with defendant Stephen Lang, made a written

motion that if the burden of proof shifted during the trial, that the defendants had the right to assert the right, under the Preamble of the U.S. Constitution, to defend the lives of the babies about to be aborted at the abortion clinic, which babies had the right to life starting at the moment of their creation. Defendants were charged with trespass under New York State Penal Law Section 140.05, a violation, for allegedly blocking the entrance to the abortion clinic at 88 Ashford Avenue, Dobbs Ferry, New York, on October 9, 1993. During the trial. the police officer whom the prosecution expected to identify all the defendants in the court room got Mr. Sherry mixed up with Mr. Lang. As a result, neither one was properly identified. The prosecution had sent another police officer home. At 1:15 A.M. which was the end of the prosecution's case, except for the inability to identify these two defendants, the Court dismissed as to Stephen Lang. The Defense moved to dismiss as to Dan Sherry also. The prosecution wanted an adjournment as to Dan Sherry to bring back the other police officer the next day to identify Dan Sherry. The Defense objected that this was a denial of Equal Protection of the Laws and was unconstitutional. If the Court was dismissing as to Stephen Lang,

it had to dismiss as to Dan Sherry. Moreover, it was prejudicial. The next day, the only one in the court room who was not a police officer, a judge, a court reporter, a court officer, a court clerk, or an attorney was Dan Sherry. Anyone who showed up would have been identified as Dan Sherry. The night before, the court room was packed with people and the defendants, at defense attorney's request, were not required to sit at the defense table. Now, the next day, Mr. Sherry was forced to incriminate himself just by showing up for the remainder of the trial, the identification. The motion to dismiss as to him should have been granted the night before. Mr. Sherry was found guilty, as was Mr. McShane and Stephen Yellico the night before. Mr. Sherry was given a 15 day sentence and Mr. McShane and Mr. Yellico were each given a 10 day sentence.

A stay was granted pending appeal, as was done in all these cases. The Appellate Term modified the jail sentences to approximately 1/3 of their lower court sentence (a 15 day sentence was modified to 5 days), stating that they were doing so in the exercise of discretion in the interests of justice. That basically stripped the New York State Court of Appeals of jurisdiction. The New York

State Court of Appeals stated that there was not a matter of law which the New York State Court of Appeals should consider on appeal. There clearly was. The trial court denied Mr. Sherry his constitutional right to Equal Protection of the Laws in not dismissing the case against him when Stephen Lang's case was dismissed. The trial court denied all the defendants their right to Equal Protection of the Laws in denying them the right to defend life defense, and the justification defense. It sentenced them to jail for exercising their constitutional right to defend life, and the Appellate Term ordered them to jail for exercising that right. By sending these defendants to jail for defending the lives of the babies about to be aborted, the trial court and the Appellate Term denied the babies their basic fundamental self evident Creator endowed inalienable right to life and their right to life and privacy under the U. S. Constitution, as they are persons from the moment of creation when the male sperm unites with the female egg and a 46 chromosome human person comes into existence with its genetic package intact and its DNA code locked in forever.

The motions below had attached the decisions in the **Tennessee Frozen Embryo Case**, supra the **Loce case**, supra and the

Wichita case, supra, all of which quoted Dr. Jerome LeJeune proving that individual human life begins when the sperm unites with the egg and a 46 chromosome human person comes into existence, with the genetic package intact, and the DNA code locked in for all eternity. Thus, the baby is a person from the moment of creation and its constitutional rights attach as well as the basic inalienable Creator endowed self evident right to life. The mother thereby has no right to kill the baby by abortion, and the defendants have the right to protect the life of the baby about to be aborted as a basic right and as a right under the U.S. Constitution.

People v. William E. Waugh, Lola Yellico, Raymond L. Mylott, Jr., Edward Greene, and Gerald Lehmann

Procedurally, this case has arrived at the U.S. Supreme Court in this manner.

The defendants are alleged to have blocked the entrance to the abortion clinic at 88 Ashford Avenue in Dobbs Ferry, Westchester County, New York, on October 9, 1993. They are charged with trespass under N.Y. State Penal Law Section 140.05. Additionally, Gerald Lehmann, Lola Yellico, and Edward Green by

the same alleged acts, allegedly blocking the doors to the abortion clinic, are alleged to have violated an order to stay away from the abortion clinic, defendants Gerald Lehmann and Lola Yellico for one such violation of a protective order, and Edward Green for two such alleged violations (the other one on July 31, 1993 at the same abortion clinic). The defendants were tried in the Village Justice Court of Dobbs Ferry, New York on March 21, 1994 in a non-jury trial in which they were represented by attorney John Broderick. It has become the practice of the Westchester County District Attorney's Office to charge these defendants with only a violation, which deprives them of a jury trial. Defendants defending the lives of babies about to be aborted have won a number of jury trials in Dobbs Ferry, and some of those convicted have gotten their convictions reversed on appeal.

These defendants were tried with defendants Patricia Daly and Ruby McDaniel for the same alleged act of blocking the entrance to the abortion clinic in Dobbs Ferry on October 9, 1993. Patricia Daly and Ruby McDaniel were represented by attorney Robert J. Winnemore who, at the very beginning of the case, filed a written motion on their behalf asserting that if the burden of proof shifted at the

end of the prosecution's case, then the defendants had the right, as a basic human right, and as a right under the U.S. Constitution, to defend the lives of the babies about to be aborted at the abortion clinic, who had a right to life from the moment of creation as a basic fundamental self evident Creator endowed inalienable right, and as a right to life under the U.S. Constitution, as they are persons at the moment of creation when the sperm unites with the egg and a 46 chromosome human person comes into existence, with the genetic package intact, and the baby's DNA code locked in forever. Mr. Winnemore's written motion on behalf of Pat Daly and Ruby McDaniel also asserted the defendant's right to the justification defense under N.Y. State Penal Law Section 35.05 (2) if the burden of proof shifted at the end of the prosecution's case. Technicalities were raised during the trial by the defense, asserting that the prosecution had not proven its case beyond a reasonable doubt against any defendant. That is still the position of all the defendants in all of these cases.

At the end of the prosecution's case, appropriate motions were made and denied by the Judge. Mr. Winnemore then renewed the motion to assert the defense of the defendants' right to defend human life starting from the moment of creation,

both as a basic human right, and as a right under the U.S. Constitution, and the defendants' right to assert the justification defense under N.Y. State Penal Law Section 35.05 (2). Attorney John Broderick joined in that motion in behalf of defendants Edward Green, Lola Yellico, William Waugh, Raymond Mylott Jr., and Gerald Lehmann. The motion was denied by the Judge without even granting the necessary hearing on whether the defendants are entitled to the justification defense. Denying the justification defense only to defendants charged with trying to prevent abortions from taking place, when they meet the criteria for the defense, and to allow it to all other the defendants who meet the criteria, is a denial of Equal Protection of the Laws and is unconstitutional. The defendants were found guilty. Defendants Edward Green, Lola Yellico, and Gerald Lehmann were then accused, by the same alleged acts they were just tried on, of violating an alleged protective order to stay away from the abortion clinic and found guilty. Defendant Edward Green was also charged and found guilty of violating an alleged order of protection on July 31, 1993. Defenses were raised to this charge of allegedly violating the protective order. Any order that the defendants stay away from the abortion clinic and refrain

from protecting the lives of the babies about to be aborted therein was null and void. The babies had the basic fundamental self evident Creator endowed inalienable right to life from the moment of their creation as all men are created equal, and had the right to life from the moment of creation under the U.S. Constitution, as they were persons from the moment the sperm united with the egg and a 46 chromosome human person came into existence with the genetic package intact and the DNA code locked in forever. The defendants had the right, as a basic human right, and as a right under the U.S. Constitution, to defend that life and had the right to the justification defense on this charge of allegedly violating the protective order. Other defenses to this charge were raised. The defendants were found guilty and sentenced to 90 days for each protective order violation and 15 days for each trespass except for Lola Yellico who received 7 days for her alleged trespass. Those with a trespass charge and a violation of an order of protection had their sentences run consecutively. Edward Green had his two 90 day sentences for his two violations of the order of protection run concurrently, but to run consecutively with his trespass violation sentence of 15 days. Raymond Mylott was fined 100 dollars plus 45

dollars surcharge. At the beginning of the trial on the underlying charge, the defense asserted the right of Edward Green, Gerald Lehmann, and Lola Yellico to a jury trial on the alleged violation of the protective order, and because of the aggregate jail time they faced. This was denied. Notices of appeal were filed for all defendants . Stays were granted for all defendants in all of these cases pending appeal to the Appellate Term.

The Appellate Term, Ninth and Tenth Judicial Districts, of the Supreme Court of the State of New York, heard these appeals and modified the jail sentences to approximately 1/3 of their lower court sentences. For example a 90 day sentence was modified to 30 days and the 15 day trespass sentences were modified to 5 days. The Appellate Term has just rendered a decision on the Patricia Daly and Ruby McDaniel case, reducing Ruby McDaniel's sentence to 5 days in the exercise of discretion in the interests of justice, and dismissed as to Patricia Daly who has passed away. The Appellate Term stated that it was modifying the sentences in the exercise of its discretion in the interests of justice. The N.Y. State Court of Appeals, by Judge Simons, then declined to accept the cases on appeal,

stating that there was no question of law which ought to be reviewed by the N.Y. State Court of Appeals. Of course there was the most basic issue of law in this nation that all men are created equal and are endowed by their Creator with the inalienable right to life , and that the babies about to have been aborted had the right to life and privacy under the U.S. Constitution, as they are persons from the moment of creation, when the male sperm unites with the female egg and a 46 chromosome human person comes into existence, with its genetic package intact, and its DNA code locked in forever. The defendants had the right to defend that life as a basic human right and as a right under the U.S. Constitution.

All these defendants now ask the U.S. Supreme Court to state what the law has been all along - that as a basic human right, outside of my document, it is self evident that all men are created equal, and are endowed by their Creator with the inalienable right to life. That this self evident Creator endowed inalienable right to life attaches at the moment of creation, as it is self evident that all men are created equal, so the right to life attaches at creation, when the 23 chromosome male sperm unites with the 23 chromosome female egg, and a 46 chromosome

human person comes into existence with its genetic package intact, and its DNA code locked in forever, identifying that person for all eternity. That **Roe v. Wade**, 410 U.S. 113 (1973), **Doe v. Bolton**, 410 U.S. 179 (1973) and their progeny, and the N.Y. State abortion statute, to the extent they allow abortions at all for any reason, are null and void. That any order or law purporting to prevent anyone from defending the life of a baby about to be aborted is null and void. That defendants trying to defend the lives of babies about to be aborted have the basic fundamental right and the right under the U.S. Constitution to defend lives from the moment of creation on, and the right to assert the justification defense under the Penal Law of the State of New York in any prosecution for blocking the doors of a location where abortions are performed to defend the lives of the babies about to be killed by abortion.

A motion has been made to the Appellate Term for a stay of execution of sentences and fines pending the petition to the U.S. Supreme Court for the granting of a writ of certiorari, and the temporary restraining order staying the execution of sentences and fines pending the

decision by the Appellate Term on the motion is still in effect.

H. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

The U.S. Supreme Court should grant the request for the issuance of a writ of certiorari because the U.S. Supreme Court was told in the medical brief submitted amicus curiae in Roe v. Wade by doctors from the Harvard Medical School, the Mayo Clinic, et al., that the baby is a person at the moment of creation.

The genetic package is intact at the moment of creation, therefore the baby is a person at the moment of creation, when the 23 chromosome male sperm unites with the 23 chromosome female egg, creating a 46 chromosome human person. Those 46 chromosomes and the way they link up structurally define a human person at the moment of creation, distinct from all other species in the universe. The DNA code for that individual person locks in at the moment of creation, which DNA code identifies that person as a unique

individual unlike any other for all eternity.

The baby is a separate set of 46 chromosomes from the mother at the moment of the baby's creation when the 23 chromosome male sperm unites with the 23 chromosome female egg. Those 46 chromosomes and the way they link up structurally define a human person. The baby is a separate human person from its mother at the moment of the baby's creation. The baby is not the mother's body at the moment of the baby's creation. The baby is a separate human person at the moment of its creation.

Therefore, the baby's right to life under the Fifth Amendment Due Process Clause and implied Equal Protection Clause and under the Fourteenth Amendment Due Process and Equal Protection Clauses had to attach, as well as the right to life under the Ninth Amendment, as the baby is a person at the moment of creation. The right to life as a natural right and as a right implied in the U.S. Constitution and in the Preamble of the U.S. Constitution had to attach.

The right to life as a natural right attaches at the moment of creation. We hold these truths to be self evident that all men are created equal and are endowed by their Creator with the inalienable right to life. The

inalienable right to life attaches at creation as it is self evident that all men are created equal. So all rights attach at creation.

The right to life is implied in the U.S. Constitution or you could not have the rights enumerated therein. It attaches at the moment of creation, as it is self evident that all men are created equal, so all rights attach at creation.

The right to life is implied in the Preamble, as the Preamble states a right to defend life, so there must be a right to life to be defended. Common defense includes the defense of life of our neighbors, which include the babies in the womb about to be aborted. Securing the blessings of liberty to our posterity includes the defense of life of babies in the womb about to be aborted. They are the nation's posterity. They cannot have liberty unless they are alive. Since there is a right to defend their lives, they must have the right to life in order to be defended. Their right to life attaches at creation, as it is self evident that all men are created equal. So all rights attach at creation.

Roe v. Wade is null and void. The baby has an equal right to life as the mother at the moment of the baby's creation, as we hold these truths to be self evident that all men are created

equal, and are endowed by their Creator with the inalienable right to life. At the moment of the baby's creation the baby's right to life is equal to the mother's. So is the baby's right to privacy, as it is self evident that all men are created equal, so all rights attach at creation. As the baby's right to privacy is equal to its mother's at the moment of the baby's creation, the mother cannot kill the baby under a right to privacy. No right to privacy gives a right to kill anyway. So Roe v. Wade is null and void. And since the baby's right to life is equal to the mother's at the moment of the baby's creation and is inalienable, Doe v. Bolton is null and void. The mother has no paramount right to life over her baby. She cannot kill her baby even for her own protection. The baby has an equal right to life as the mother from the moment of the baby's creation.

The mother has no right to choose to kill the baby. There is no reproductive right to kill the baby. The mother has no right to cross state lines to kill her baby under the Commerce Clause. Roe v. Wade and Doe v. Bolton and their progeny are null and void. Any statute or court order that purports to allow abortion or to prevent anyone from defending the life of a baby about to be

aborted is null and void.

The U.S. Supreme Court in Roe v. Wade has allowed what now amounts to over 30 million American babies to have been unjustly murdered by abortion. That is a crime against humanity, and specifically against the American babies allowed to have been killed. It is government sanctioned infanticide. Allowing 30 million American deaths without due process of law is an act of war against the American People, which is defined as treason under Article III, Section III of the U.S. Constitution. Moreover, this nation indicted the Nazi officers at the Nuremberg Trials for crimes against humanity. See the book entitled Justice at Nuremberg. Allowing the deaths of 30 million innocent American babies is a crime against humanity.

The U.S. Supreme Court must reverse this course of conduct and declare Roe v. Wade and Doe v. Bolton and their progeny and any case, statute, or order which purports to allow abortion unconstitutional, as well as any case, statute, or order which purports to prevent the defense of any baby about to be aborted.

CONCLUSION

ROE v. Wade and Doe v. Bolton and their progeny and any decision, order, or statute, including the N.Y. State abortion statute, Penal Law 125.05, which allows abortion and does not uphold the right to life starting from the moment of creation must be struck down, as well as any decision, order, or statute which purports to prevent the defense of life starting from the moment of creation.

Respectfully submitted,

Nancy Welz, George McShane,
Daniel Sherry, Stephen Yellico,
William E. Waugh, Lola Yellico,
Raymond L. Mylott, Jr.,
Edward Green, Gerald Lehmann,
William Draghi,
Pro se Petitioners

(see last page of appendix, pg 219, for petitioners' addresses)

State of New York Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS-RESPONDENTS v. NANCY WELZ, DEFENDANT-APPELLANT.

Decided May 6, 1996

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for stay dismissed as academic.

Dated at Rome , New York

May 6 , 1996

Richard D. Simons
Associate Judge

Appeal from an order of the Appellate Term of Supreme Court, for the 9th and 10th Judicial Districts, Nassau County, dated April 15, 1996 which modified, and as so modified, affirmed a judgment of Justice Court, Village of Dobbs Ferry, Westchester County, dated March 10, 1994.

State of New York Court
of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS-RESPONDENTS v. WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Decided May 6, 1996

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of

the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for stay dismissed as academic.

Dated at Rome , New York

May 6 , 1996

Richard D. Simons
Associate Judge

Appeal from an order of the Appellate Term of Supreme Court, for the 9th and 10th Judicial Districts, Nassau County, dated April 15, 1996 which modified, and as so modified, affirmed a judgment of Justice Court, Village of Dobbs Ferry, Westchester County.

State of New York Court
of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS RESPONDENTS v. WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Decided May 6, 1996

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for stay dismissed as academic.

Dated at Rome , New York

May 6, 1996

Richard D. Simons
Associate Judge

Appeal from an order of the Appellate Term of Supreme Court, for the 9th and 10th Judicial Districts, Nassau County, dated April 15, 1996 which modified, and as so modified, affirmed a judgment of Justice Court, Village of Dobbs Ferry, Westchester County, dated February 17, 1994.

State of New York Court
of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS-RESPONDENTS v. GEORGE MC SHANE, DANIEL SHERRY, and STEPHEN YELLICO DEFENDANT-APPELLANTS.

Decided May 6, 1996

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application

timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for stay dismissed as academic.

Dated at Rome , New York
May 6, 1996

Richard D. Simons
Associate Judge

Appeal from an order of the Appellate Term of Supreme Court, for the 9th and 10th Judicial Districts, Nassau County, dated April 15, 1996 which modified, and as so modified, affirmed a judgment of Justice Court, Village of Dobbs Ferry, Westchester County, dated February 15, 1994.

State of New York Court
of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS RESPONDENTS v. WILLIAM E. WAUGH, LOLA YELLICO, RAYMOND L. MYLOTT, JR., EDWARD GREEN and GERALD LEHMANN DEFENDANT-APPELLANTS.

Decided May 6, 1996

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for stay dismissed as academic.

Dated at Rome , New York, May 6, 1996
Richard D. Simons, Associate Judge

Appeal from an order of the Appellate Term of Supreme Court,

Violation of Protective
Order, July 31, 1993

Procedurally these cases got to the U.S. Supreme Court in this manner. William Draghi was charged with Disorderly Conduct for having allegedly blocked the doors on July 31, 1993 to the abortion clinic at 88 Ashford Avenue in Dobbs Ferry, N.Y. He was charged by the Office of the District Attorney of Westchester County, N.Y. under New York State Penal Law 240.20 with Disorderly Conduct which is a violation.

At the very beginning of this case, a written motion was made on Mr. Draghi's behalf asserting that if the burden of proof would shift at the end of the prosecution's case at trial, then Mr. Draghi had the right as a basic fundamental right and as a right under the U.S. Constitution to defend the lives of the babies about to be killed by abortion at the abortion clinic, which babies had the right to life from the moment of creation as a basic self evident Creator endowed fundamental inalienable right, as it is self evident that all men are created equal, and as a right under the U.S. Constitution, as the baby is a person at the moment of creation when the 23 chromosome male sperm unites with the 23 chromosome female egg, and a 46 chromosome

Westchester County (Iler, J.) dated February 15, 1994 (McShane and Yellico) and February 17, 1994 (Sherry), convicting them of trespass and imposing sentences ;

and the appeal having been argued by ROBERT WINNEMORE,ESQ.
for the appellant and by MICHAEL BORRELLI,ESQ. for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction are unanimously modified as a matter of discretion in the interest of justice, by reducing the sentences of imprisonment to five days for each defendant and, as so modified, judgments affirmed.

ROBERT WINNEMORE,ESQ.
84-52 GRAND AVE.
ELMHURST, N.Y. 11373

DISTRICT ATTORNEY
APPEALS BUREAU
111 GROVE STREET

10

WHITE PLAINS, N.Y.

94-986-88 W CR

Supreme Court of the State of New York

for the 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT v. GEORGE MC SHANE, DANIEL SHERRY and STEPHEN YELLICO DEFENDANTS APPELLANTS

Appeal by defendants from judgments of the Justice Court, Village of Dobbs Ferry, Westchester County (Iler, J.) dated February 15, 1994 (McShane and Yellico) and February 17, 1994 (Sherry), convicting them of trespass and imposing sentences.

Judgments of conviction unanimously

modified as a matter of discretion in the interest of justice, by reducing the sentences of imprisonment to five days for each defendant and, as so modified, judgments affirmed.

The convictions of defendants for trespass were properly established beyond a reasonable doubt. The sentences were excessive to the extent indicated above.

94-1088-89 W CR 94-1088-89 W CR

At a Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v.
WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Decided April 15, 1996.

The above named appellant having appealed to this court from orders of the Justice Court, Village of Dobbs Ferry,Westchester County (Iler, J.) entered on February 17, 1994, finding him to be in

criminal contempt on two counts of violating an order of protection and imposing sentence ;

and the appeal having been argued by ROBERT WINNEMORE,ESQ. and LAWRENCE WASHBURN,ESQ. for the appellant and by MARY RIZZO,ESQ.
and CHRISTOPHER SHAW, ESQ for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the orders are unanimously modified as a matter of discretion in the interest of justice by reducing the term of imprisonment on each count of violating the order of protection to 45 days, the sentences to run concurrently with the sentence imposed for disorderly conduct on February 17, 1994 and, as so modified, affirmed.

ROBERT WINNEMORE,ESQ.
84-52 GRAND AVE.
ELMHURST, N.Y. 11373

DISTRICT ATTORNEY
APPEALS BUREAU
111 GROVE STREET
WHITER PLAINS, N.Y.

94-1088-89 W CR 94-1088-89 W CR

At a Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v.
WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Appeal by defendant from orders of the Justice Court, Village of Dobbs Ferry,Westchester County (Iler, J.) entered

on February 17, 1994, finding him to be in criminal contempt on two counts of violating an order of protection and imposing sentence .

Orders unanimously modified as a matter of discretion in the interest of justice by reducing the term of imprisonment on each count of violating the order of protection to 45 days, the sentences to run concurrently with the sentence imposed for disorderly conduct on February 17, 1994 and, as so modified, affirmed.

Defendant's violations of the order of protection were established beyond a reasonable doubt. He did not challenge the proof offered by the People that he knew of the order of protection and its contents and received notice of the violation (see, Donnino, Practice Commentaries, 39 McKinney's Consol Laws of N.Y., pp 578-579z). The sentences were excessive to the extent indicated above.

94-1090 W CR

APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH AND 10TH

JUDICIAL DISTRICTS

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v. WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Decided on April 15, 1996.

The above named appellant having appealed to this court
from a judgment of the Justice Court, Village of Dobbs Ferry,
Westchester County (Iler, J.- Trial and Sentence) convicting him of disorderly conduct and sentencing him to 15 days imprisonment. He was also issued a final order of protection ;
and the appeal having been argued by ROBERT J. WINNEMORE,ESQ.
and by LAWRENCE WASHBURN,ESQ. for the appellant and by MARIE RIZZO and by CHRISTOPHER SHAW, ESQ, for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the

judgment of conviction is unanimously modified as a matter of discretion in the interest of
justice by reducing the sentence of imprisonment to five days and,
as so modified, affirmed.

94-1090 W CR
APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH AND 10TH JUDICIAL DISTRICTS

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v. WILLIAM R. DRAGHI, DEFENDANT-APPELLANT.

Decided on April 15, 1996.

Appeal by defendant from a judgment of the Justice Court, Village of Dobbs Ferry, Westchester County (Iler, J.- Trial and

Sentence) convicting him of disorderly conduct and sentencing him to 15 days imprisonment. He was also issued a final order of protection.

Judgment of conviction unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to five days and, as so modified, affirmed. The guilt of defendant was established beyond a reasonable doubt in a trial free from error. The sentence was excessive to the extent indicated above.

94-581-82 W CR
94-991, 94-993-94 W CR
March 26, 1996 TERM

At a term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT v. WILLIAM E. WAUGH, LOLA YELLICO, RAYMOND L. MYLOTT, JR., EDWARD GREEN and GERALD LEHMANN, APPELLANTS

The above named appellants having appealed

to this court
from judgments of the Justice Court, Village of Dobbs Ferry
Westchester County (Badie, J.) entered an March 21, @994, convicting all of defendants of trespass and adjudicating defendants Green, Lehmann and Yellico to be in contempt of court for violating orders of protection and imposing sentences ;

and the appeal having been argued by ROBERT WINNEMORE, ESQ and by LAWRENCE WASHBURN, ESQ. for the appellants and by CHRISTOPHER SHAW, ESQ. for the respondent and due deliberation having been had thereon ;

It is hereby ordered and adjudged that the judgments are unanimously ,modified as a matter of discretion in the interest of justice by reducing the terms of imprisonment for trespass to 5 days and by reducing the terms of imprisonment for violating the Orders of protection to 30 days, the sentences to run concurrently and, as so modified, judgments affirmed.

94-581-82 W CR
94-991, 94-993-94 W CR
March 26, 1996 TERM

At a term of the Supreme Court of the State of New York
for the 9th and 10th Judicial Districts

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT v. WILLIAM E. WAUGH, LOLA YELLICO, RAYMOND L. MYLOTT, JR., EDWARD GREEN and GERALD LEHMANN, APPELLANTS

Appeal by defendants from judgments of the Justice Court, Village of Dobbs Ferry , Westchester County (Badie, J.) entered an March 21, @994, convicting all of defendants

of trespass and adjudicating defendants Green, Lehmann and Yellico to be in contempt of court for violating orders of protection and imposing sentences.

Judgments unanimously modified as a matter of discretion in the interest of justice by reducing the terms of imprisonment for trespass to 5 days and by reducing the terms of imprisonment for violating the Orders of protection to 30 days, the sentences to run concurrently and, as so modified, judgments affirmed.

Defendants' guilt of trespass was established beyond a reasonable doubt in a trial free from reversible error. Moreover those defendants found to have violated the provisions of orders of protection did not challenge the proof offered by the People that they knew of the order of protection and its contents and received notice of the violation (see, Donnino, Practice Commentaries, 39 McKinney's Consol Laws of N.Y., pp 578-579z).

94-1090 W CR
APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH AND 10TH JUDICIAL DISTRICTS

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v. NANCY WELZ, DEFENDANT-APPELLANT.

Decided on April 15, 1996.

The above named appellant having appealed to this court
from a judgment of the Justice Court, Village of Dobbs Ferry,
Westchester County (Iler, J.- Trial and Sentence) dated March 10, 1994 convicting her of trespass and sentencing him to 15 days imprisonment and a one year permanent order of protection;

and the appeal having been argued by ROBERT J. WINNEMORE,ESQ.

and by LAWRENCE WASHBURN,ESQ. for the

appellant and by MARIE RIZZO and by CHRISTOPHER SHAW, ESQ, for the respondent and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to five days and, as so modified, affirmed.

94-1090 W CR
APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 9TH AND 10TH JUDICIAL DISTRICTS

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT v. NANCY WELZ, DEFENDANT-APPELLANT.

Decided on April 15, 1996.

Appeal by defendant from a judgment of the Justice Court, Village of Dobbs Ferry, Westchester County (Iler, J.- Trial and Sentence) dated March 10, 1994 convicting her of disorderly conduct and sentencing her to 15 days imprisonment. He was also issued a final order of protection.

Judgment of conviction unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to five days and, as so modified, affirmed.

The conviction of defendant for the offense charged was properly established by the People. The contentions raised by defendant as to the defense of justification, are lacking in merit (see, People v. Craig, 78 NY2d 616). The sentence was excessive to the extent indicated above.

COMPANION CASES

People v. Ruby McDaniel

Pending before N.Y. Court of

Appeals
People v. Daniel Sherry
Pending before Appellate Term
Supreme Court of N.Y. for 9th
and 10th Judicial Districts

QUOTES OF STATUTES AND AUTHORITIES

We hold these truths to be self evident that all men are created equal and are endowed by their Creator with certain inalienable rights, that among these are the right to life, liberty, and the pursuit of happiness.

Preamble of the U.S. Constitution That the Constitution was created to"provide for the common defense... and secure the blessings of liberty to ourselves and our posterity..."

Fifth Amendment Due Process Clause No person shall be...deprived of life, liberty, or property, without due process of law Implied Fifth Amendment Equal Protection Clause No person shall be denied the equal protection of the laws

Fourteenth Amendment Due Process Clause No State shall...deprive any person of life, liberty, or property without due process of law

Fourteenth Amendment Equal Protection Clause No State shall...deny to any person within its jurisdiction the equal protection of the laws

Ninth Amendment The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

Article I, Section 1 of the New Jersey Constitution

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty...

N.Y. State statute purportedly allowing abortion

N.Y. State Penal Law Section making abortion murder

Commerce Clause of the U.S. Constitution
Article I, Section 8
Provides Congress with the power to "regulate
commerce with foreign nations, and among the
several states, and with the Indian tribes"

First tenet of Natural Law:
Do good and avoid evil

Cicero: An unjust law is no law

The Federalist Papers
A Mentor Book of the New American Library,
of Penguin, Inc., published in 1961 by
N.L. Penguin, Inc., edited by Clinton Receiptor,
Paper No. 43 by James

Madison, at p. 279
Paper No. 34 by Alexander Hamilton, at p. 207
Paper No. 8 by Alexander Hamilton, at p. 68
Paper No. 78 by Alexander Hamilton, at p. 468
Paper No. 25 by Alexander Hamilton, at p. 166

The Oath of Hippocrates (460-357 B.C.)

I swear by Apollo Physician, by Asclepias, by Health, by Panacea, and by all the gods and goddesses, making them my witnesses, that I will carry out, according to my ability and judgment, this oath and this indenture...I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give to a woman a pessary to cause abortion.

Blackstone's Commentaries on the

Common Law

State that the Common Law is based on Natural Law and God's Revealed Law, and "upon these depend all human laws", and "no human laws should be suffered to contradict these." Jones' Blackstone, Vol. 1, Section 40, at p. 42, Ed. by William Casey Jones, Clatter's Publishing Division, 1915, 1976, Baton Rouge, Louisiana. Natural Law are the "immutable laws of human nature" laid down by God regulating and restraining man's free will. Jones' Blackstone, Ibid., Vol. 1, Section 39.

The Book of Exodus

The Fifth Commandment: Thou Shalt Not Kill

Exodus 20:13

The Book of Proverbs

Do not hesitate to rescue those about to be

unjustly killed
Proverbs 24:11

Summa Theologiae, by Saint Thomas Aquinas

F. STATUTES AND AUTHORITIES CITED

We hold these truths to be self evident that all men are created equal and are endowed by their Creator with certain inalienable rights, that among these are the right to life, liberty, and the pursuit of happiness.

Preamble of the U.S. Constitution

That the Constitution was created to "provide for the common defense... and secure the blessings of liberty to ourselves and our posterity..."

Fifth Amendment Due Process Clause

No person shall be...deprived of life, liberty, or property, without due process of law

Implied Fifth Amendment Equal

Protection Clause

No person shall be denied the equal protection of the laws

Fourteenth Amendment Due Process Clause

No State shall...deprive any person of life, liberty, or property without due process of law

Fourteenth Amendment Equal Protection Clause

No State shall...deny to any person within its jurisdiction the equal protection of the laws

Ninth Amendment

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

Article I, Section 1 of the New Jersey Constitution

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and

liberty...

N.Y. State statute purportedly allowing abortion

N.Y. State Penal Law Section making abortion murder

Commerce Clause of the U.S. Constitution

Article I, Section 8 Provides Congress with the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes"

First tenet of Natural Law:
Do good and avoid evil

Cicero: An unjust law is no law

The Federalist Papers
A Mentor Book of the New American Library, of Penguin, Inc., published in 1961 by N.L. Penguin, Inc., edited by Clinton Receiptor,

Paper No. 43 by James Madison, at p. 279

Paper No. 34 by Alexander Hamilton, at p. 207

Paper No. 8 by Alexander Hamilton, at p. 68

Paper No. 78 by Alexander Hamilton, at p. 468

Paper No. 25 by Alexander Hamilton, at p. 166

The Oath of Hippocrates (460-357 B.C.)

Blackstone's Commentaries on the Common Law

State that the Common Law is based on Natural Law and God's Revealed Law, and "upon these depend all human laws", and "no human laws should be suffered to contradict these." Jones' Blackstone, Vol. 1, Section 40, at p. 42, Ed. by William Casey Jones, Clatter's Publishing Division, 1915, 1976, Baton Rouge, Louisiana. Natural Law are the "immutable laws of human nature" laid down by God regulating and restraining

man's free will.

Jones' Blackstone, Ibid., Vol. 1, Section 39.

The Book of Exodus

The Fifth Commandment: Thou Shalt Not Kill

Exodus 20:13

The Book of Proverbs

Do not hesitate to rescue those about to be unjustly killed

Proverbs 24:11

Summa Theologiae, by Saint Thomas Aquinas

Federal Questions Raised on the Record

People v. William Waugh, et al

March 21, 1994, oral motion to present the justification defense, pp 98, ln 13-15 of minutes

Also pp 98, ln 20-25, Mr. MYLOTT filed a written motion for the justification defense

COURT CASES

MUNICIPAL COURT OF NEW JERSEY

LAW DIVISION - MORRIS COUNTY

CRIMINAL ACTION
DOCKET NO. C1771, ET SEQ.

STATE OF NEW JERSEY
V. RESPONDENTS

DECISION
ALEXANDER LOCE, et als.
DEFENDANTS.
APRIL 29, 1991

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B E F O R E: HONORABLE MICHAEL J. NOONAN

A P P E A R A N C E S:

PROSECUTOR: PAUL BANGIOLA, ESQ.
FOR THE STATE OF NEW JERSEY

RICHARD J. TRAYNOP, ESQ.
PATRICK J. MULLANEY, ESQ.
ROGER W. DALEY, ESQ.
FOR THE DEPENDANTS

SUZANNE HAUSEP.. C.S.R.

JUDGE: Please be seated, ladies and gentlemen.

The prosecutors is outside? Good afternoon gentlemen.

We already have summations, I am going to read my decision into the record. Does anyone want to be heard before I begin?

MR. MULLANEY: Put my appearance on the record. I'm Pat Mullaney. I am Mr. Loce's attorney. And just put on the record, we are also going to raise the constitutional right to life under the 14th Amendment, of Mr. Loce's child, which we believe was proven to be a human being and therefore a constitutionally protected person.

We do run into the issue of standing, in other words, how can Mr. Loce raise the constitutional rights of another. And I would just call the Court's attention to the case of Griswald vs. Connecticut which was a 1965 Supreme Court decision, therein -- actually in that case the right to privacy was created.

And it was having suffered the injury of a municipal court conviction, the physician who sold the birth control pills

to the married couple and prosecuted under the local statute prohibiting that, appealed and said that these people have a constitutionally right to privacy, and that the conviction that they suffered was a violation of -- the conviction gave the doctor standing to raise the third party right.

Just to establish here and get on the record, I appreciate the fact that Mr. Loce may not be convicted and if he is the standing issue isn't perfected, I would suspect, under the injury of his conviction is actually added.

But to cover all the bases, I think it's important to say we will raise, Mr. Loce is raising the unborn 14th amendment constitutional rights of a person and under the influence of that the statute should be correctly construed to, so as to give them legal protection at this time.

THE JUDGE: All right, counselor, you want to be heard?

MR. TRAYNOR: Judge, I want to join in that application, in those comments concerning the other defendants, at least the defendants that I represent.

And I presume Mr. Daley would join

also with respect to the balance of the defendants. There are 14 other defendants besides Loce.

And those, that application I will ask to be joined by the other defendants.

MR. BANGIOLA: I will stand upon mu previous remarks and summation and submit to your Honor's judgment at this time.

THE JUDGE: All right, gentlemen, I am going to read my findings of fact and the findings of law into the record and after I get done if there are any other questions or any requests of additional findings of fact or whatever, you can bring them up at that time.

I hope that the findings are sufficient to answer all those questions, especially the ones you have just raised here today.

If not, however I will entertain any other requests at that time just to clear the record for your purposes and for the purposes of the Court.

MR. TRAYNOR: Judge, one procedural thing. There were certain waivers and consents and certifications submitted. I don't know whether your Honor wants those offered into evidence or whether your

Honor will simply take them?

THE JUDGE: I would like all the certifications of all the defendants. I will read the names in the record now and I assume that eventually, hopefully, shortly all the affidavits will be placed in the record, and marked accordingly.

I understand, have been talking with the parties, that there are a couple of affidavits outstanding, these people are not in the state?

MR. TRAYNOR: That's correct.

THE JUDGE: Administerial problems that have to be taken care of. I understand that.

So what I am going to do is I am going to read the names into the record, and any affidavits that are outstanding will, I hope, follow shortly after today.

MR. TRAYNOR: Yes.

THE JUDGE: Now, first of all, on September 8, 1990, all the following defendants were charged with the defiant trespass by entering the premises of 101 Madison Avenue, fourth floor, certain doctors' offices; when they knew they were not privileged to do so and after being told to leave the premises. In violation

of N.J.S. 2C:18-3(b) (1).

Now defiant trespass is as follows: "A person commits an offense if knowing that he is not licenses or privileged to do so enters or surreptitiously remains in any structure of separately secured or occupied portion thereof."

In Section B, defiant trespass: A person commits a petit disorderly persons offense if knowing that he or she enters or remains in any place as to which notice against trespass is given by actual communication to the actor;..." which is basically the facts in this particular case.

The defendants are John Adams, Lisa Adams, Lori Chadwick, Fredrick Harrison, Jeannie Henderson, Tina Keil, k-e-a-I-l.

MR. TRAYNOR: Judge, Krail k-r-a-I-l.

THE JUDGE: K-r-a-I-l. Okey, Daniel Lickteig, Alex Loce, Tyrone Malone, Charles Matson, James McWilliams, Christopher Moscinski, Deborah Smaldore, Ralph Traphagen, Neal Webster.

And if there are affidavits are not in the record I would like them to be placed in the record as soon as possible.

The affidavits I'm talking about, of

course, are those that talk in terms of waiver of any conflict because we only have three convince attorneys and we have a number of defendants.

Now there are certain stipulations that were entered into in this case.

The defendants admitted and acknowledged as true and stipulated as finding of fact by the Court, to all elements of the offense with the exception of mens rea requirement as set forth in N.J.S. 2C:18-3(b) and which I have already read.

In other words, the defendants stipulated to the fact that, number one, that their identity, to their identity as being there on the premises and trespassing, there presence on the subject premise through forceful entry as charged.

There is a stipulation that they have been given notice adequately as required by statute. In other words, notice that there were supposes to trespass and they disregarded the notice and forcibly entered the doctor's offices.

And all other proofs as stipulated as may be required by the State in establishing the charge except mens rea.

So that is clear, the State has the burden of proving each and every element of every offense beyond a reasonable doubt.

The burden is on the State and never shifts to the defendants.

In this case, it is stipulated, all elements of this offense as I have read it here today, all elements are stipulated by the defense except the element of mens rea or criminal intent.

So, therefore, the State had one element left that was not stipulated to.

The State acknowledges as true and stipulates as findings of fact by the COURT the following facts to be relied upon by the defendants in the case affirmative defenses offered at trial.

One: And this, of course, was stipulated between the parties. That one September 8, 1990 the date of the criminal trespass herein charged as identified young woman who was Mr. Loce's fiancee, was eight week pregnant. That is stipulated to.

That Mr. Loce was the biological father of the fetus which was the object of the aforesaid pregnancy; and on

September 8, 1990 the aforesaid pregnancy was terminated by an act induced abortion by a medical doctor, at the time and place charged by the State, as being the time and place of the charged trespass.

That was stipulated to.

At trial Mr. Loce and the other defendants raised the following defenses: Use of force for the Protection of Other Persons, N.J.S. 2C:3-5; Necessity and Other Justifications, N.J.S.2C:3-2; Justification and Property Crimes,. N.J.S. 2C:3-10.

The Right to Defend Life according to the New Jersey Constitution, Article One, Section One; and the Right as a Father to Defend Progeny, 14th Amendment, U.S. Constitution.

This, of course, was Mr. Loce's individual defense.

Mr. Loce also raises the defense of Use of Force by Persons with Special Responsibility N.J.S.2A:3-8, based on his status as the father of the fetus about to be aborted.

Each defense was presented in the context that the fetus aborted at the facility on September 8, 1990 was, in

fact, a human being.

The defense then proffered the testimony of Dr. Jerome LeJeune, an M.D, a Ph.D, a geneticist from the University of Paris who discovered Down's Syndrome and its causes.

It was proffered by the defense that Dr. LeJeune would offer expert testimony as to when individual life begins. This testimony was argued, was relevant to the defense of all defendants on the issue of mans rea and in establishing the eight week old fetus as a person pursuant to the statuary defenses previously mentioned herein.

Dr. Bernard Nathanson, .expert in obstetrics and gynecology and Dr. Russell Hittinger, an expert in philosophy; were proffered as experts on the issue whether the eight week old fetus was a person separate and apart from its mother.

I allow their testimony.

Few rights are more fundamental than that of an accused to present witnesses in his or her own defense. State vs. Harold, 183 N.J. Super. 485 (App. Div. 1982).

This
right extends to all relevant evidence.
Relevant evidence is defined by Evidence
Rule

1, Section 2, N.J.S. 2A:84 A-3, as "...
evidence having any tendency in a reason
to
prove any material fact"

On the issue of criminal intent, on the issue of the meaning of what is a person, in
the context of this case I allow their testimony.

And thus the parties focussed on the key issue in this case -- when does individual life begin.

Dr. LeJeune testified first.

He's a professor of fundamental genetics
in
the Children's Hospital, Paris. He is a pediatrician and a geneticist. He represented France on the United Nation's scientific committee on the danger of

atomic
radiation. He established the first course of human genetics at the California Institute of Technology.

He is credited with the discovery of the first chromosomal abnormality in man, Dow's syndrome. He was awarded the William
Allen Memorial medal in the United States for his work in genetics.

He was specifically asked the question:
When does human life begin? His answer was very interesting.

He said he does not know and he did not
know when human life began, for human life is continuous; and that is a question of evolutionary theory.

However, he did have an opinion as to

when individual human life began. And he testified that individual human life begins
at conception.

Dr. LeJeune explained that nature has invented an extraordinary device in her defense to protect the privacy of the very first stage of human being.

He said the right of privacy is written
in the following way in biology. The egg is surrounded by a permeable membrane called
zona pellucida.

Once one sperm cell penetrates the egg this membrane becomes impermeable. According to the doctor 's testimony this change in permeability occurs in a microsecond.

Thus all other sperm cells are prevented from entering the egg. At this moment the genetic material from the male sperm and the genetic material from the

female egg are locked in together.

No other genetic material can enter from that point on, according to the doctor's testimony.

And all of the genetic material is in place at that moment, which Dr. LeJeune calls fecundation or conception. According to the doctor's opinion, this moment when individual human life begins.

This court accepts Dr. LeJeune's opinion as true and finds that the individual human life begins at conception.

Now Roe vs. Wade concerned the constitutionality of Texas' Criminal Abortion Statute. State of Texas argued that life begins at conception. Texas, in Roe vs. Wade, 410. U.S.133 at page 159, 1973 decision. The Court noted at page 159, Texas urges that apart from the 14th Amendment, life begins at conception and is present throughout pregnancy.

And that therefore the state has a compelling interest in protecting that life from and after conception. The United States Supreme Court in Roe v. Wade

1973 said, at page 159: "...We need not resolve the difficult question when life begins.

"When those trained in respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge is not in a position to speculate as to the answer."

That was 1973. This is 1991. Based upon the undisputed testimony of Dr. LeJeune those trained in the respective discipline of medicine have arrived at a consensus in 1991. And that consensus is that individual human life begins at conception.

This court, therefore, makes a finding of fact based upon Dr, LeJeune's testimony that individual human life begins when the male sperm penetrates the female egg cell. All the genetic material a human being will

ever need is locked in the egg at that moment, according to Dr. LeJune's testimony.

He testified that there is no disagreement among biologists throughout the entire world that after fecundation no new genetic information enters the egg. At that moment a new individual, a new human constitution begins to live.

In this regard I would like to read Dr. LeJeune's response to two very important questions.

The two questions were: One, when does the individual human life or constitution begin? And, two, what is a human being?

His response is as follows: A human constitution -- and this is at page 62 of the transcript, line 18.

"The human constitution happens at the moment the genetic information coming from the father goes into the cell which is ready to have it, which is the female cell. And once the zona pellucida has closed entirely the information is locked

in.

"No one can enter later. And all of it has to be there. To answer your question when does this special constitution begin, it's very simple: At the moment which is microseconds of change, of the zone pellucida, which now is locking in this particular human constitution, which is a new being.

"Now what is a human being? That's very simple. A human being has to be human; has to be a being. Then a human being is only a member of our species.

And an egg of a chimpanzee can't be a human being because it is a chimpanzee being. But every time that genetic information is human, every time this message which is at the beginning of life which is alive and which is life, as soon as this message is really a human message, then this life is a human life.

"And if it is a being, this being is a human being."

Dr. LeJeune also testified that new discoveries in genetic research have created a consensus among biologists and geneticists around the world that not only does individual human life begin at

conception, but it can be identified as a unique individual within its own species. He explained that the Jeffries DNA identification system which was invented about four years ago, allows this to happen. The DNA ribbon which rates the chromosome of the male and female and can be read like the bar code system in the supermarket.

The Jeffries system examines the DNA ribbons within the chromosome and can identify the unique DNA codes in every individual human being much like a genetic fingerprint.

This empirical data was not available in 1973 when Roe vs. Wade was decided.

Additional new scientific and medical discoveries since 1973 testified to by Dr. Bernard Nathonson include: fetal surgery, new ultra sound advances where the fetus can now be observed in animated fashion within the womb; and some interesting data on the immunization system of the mother and its effect during pregnancy.

Again these discoveries were not available in 1973. Dr. Nathanson also testified on the issue of the fetus being separate and apart from the mother, thus

supporting Dr. LeJuene's testimony that at conception two separate, individual human beings harmoniously share their life together. Dr. Nathanson used the human immunization system to prove that the mother and the fetus are two separate human beings.

Page 108 of the transcript.

White blood cells and our immune system do not destroy our own kidneys, or our own livers, because our white blood cells can recognize self from non-self.

And when there's a foreign substance put into one's body, the white blood cells will recognize and immediately attack it in an attempt to throw it out, to get rid of it because it is foreign. It's not self.

Now when that pregnancy implants and makes a nexus with the mother's circulation so that chemical messengers are sent of the mother, the white blood cells and, in fact, the entire immune system is galvanized because it recognizes there is something in the mother's body, her body which is not self.

It is foreign. It is this baby who is a foreign person to the mother. And a

concerted immune attack is focussed on the baby, the attempt being to expel the foreign intruder.

It is recognized, as I say, as non-self. However, over the eons, obviously, we have -- we meaning all of us who have been unborn babies at some point, we have erected a defense against this attack.

We have what is called the trophoblast. This layer of cells which constitutes our placenta, our afterbirth. And what is really a wall, an immunological wall, behind which we can find sanctuary.

It stops the attack. And for the most part all of us survive the attack. Those who don't survive are expelled as spontaneous abortions.

Those are the people, the unborn babies who did not survive the attack. They are cast out as non-self or foreign bodies. But for the most part we do succeed in repelling this attack ans that's the reason we are all here today.

The person or human being sought to be saved in this case was an eight week old human fetus.

When Dr. LeJeune was asked to

describe an eight week old fetus, he referred to it a Tom Thumb because it measures one inch from head to toe, approximately the size of your thumb.

He described it as a tiny human being with fingers and toes, and with palm prints you could read with a microscope.

When asked what effect an abortion would have on an eight week fetus, Dr. LeJeune said, "It kills a member of our species."

The United States Supreme Court in Roe vs. Wade conducted an exhaustive search for the definition of person within the United States Constitution.

They reviewed the entire Constitution and found that the use of the word "person" in the constitution was such that its only application was postnatal.

Nowhere in the Constitution, they said was there any prenatal application. 410 U.S. at page 157.

In this regard Dr. LeJeune found it interesting that this country's laws recognized a company as a person, but will not recognize a company of cells as a person.

I find based upon the undisputed

medical and scientific testimony presented before this Court that the eight week old fetus in this case was a living person, a human being and a unique and individual company of cells.

Roe vs. Wade held that the right of personal privacy includes the abortion decision. But that this right to privacy of the mother was not unqualified and must be considered against important state interests in regulation. 410 U.S. at 154.

The United States Supreme Court in Roe vs. Wade also held that for the stage prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician. 410 U.S. at 164.

In this case it has been stipulated that the fetus was eight weeks old thus within the first trimester. Here the pregnant woman chose to abort. Her physician was attempting to grant her request to abort when the Dr. Nathanson, an expert in obstetrics and gynecology testified that, well, he asked this question: Doctor, is the reborn baby separate from its mother? His answer was

as follows: Yes, it is always a separate person. The circulations are separate. They never mix. And if they do mix, it can be lethal to the baby or, in fact to the mother too. But principally to the baby.

We know they are separate human beings from immunological studies. By that I mean this: The baby is composed, as Dr. LeJeune pointed out repeatedly, of elements, genetic elements from both mother and father. Now it is housed separately as a kind of tenant in the mother's body.

But it does have paternal genes and paternal chromosomal substance. So it is in effect, another person. It is not just the mother. Now the white blood cells and the immune system of the mother's body or anybody's body have the ability to recognize and distinguish self from non-self.

And that is really the reason why our defendants forcibly entered and trespassed upon the physician's property in an attempt to prevent the abortion.

The prosecutor in his summation drew an analogy to a legal execution pursuant

to the capital punishment statute. He said that if someone forcibly entered the jail and trespassed and tried to stop a legal execution of a convicted murderer then this person would surely be guilty of trespass because the execution was legal according to the law and thus there would be no justifiable reason under the law to prevent it from occurring.

And this person would be guilty of trespassing. I agree with the prosecutor a person who trespassed to prevent a legal execution would be guilty of trespass notwithstanding the fact that their defense was to save a convicted murderer's life.

Roe vs. Wade was decided 18 years ago. Had they had the benefit of all the scientific discoveries over those past 18 years, their decision might have been different. But, obviously they did not.

In 1973 they chose not to resolve the difficult question of when life begins. Their reasoning at that time was based upon the fact there was no consensus in the medical and scientific communities as to when individual human life began.

But times have changed, and perhaps

that question should be addressed by the United States Supreme Court today.

However Roe vs. Wade is still the law of the land and this court is bound by it. Therefore I find that the eight week old fetus in this case was a living human being that was legally executed pursuant to the United States Supreme Court decision in Roe vs. Wade.

And therefore there was no justifiable excuse to trespass in this case in an attempt to prevent a legal act of abortion.

All the defendants herein are held to know the law and are thus bound by it. In this case all the elements of trespass have been stipulated to except mens rea or criminal intent.

I find that the State has proven the element of men's rea beyond a reasonable doubt. The defendants knew exactly what they were doing and they are held to know the status of prevailing law in this country.

In other words whether they fully comprehended Roe vs. Wade or not, they are bound by it. Their affirmative defenses fall because the abortion they attempted

to prevent was legal under the principles set down in Roe vs. Wade.

Therefore for these reasons I find all of the named defendants guilty of trespass pursuant 2C:18-3(b). And counsel, I'll hear as you as to sentencing.

MR. TRAYNOR: Your Honor please, with respect to those defendants that I represent and they are as follows: William Harrison, James McWilliams, Deborah Smaldore, Lori Chadwick, Tina Frail, Christopher Moscinski, John Adams and Lisa Adams, I would ask your Honor in mitigation of sentence to consider the fact that these persons, these defendants as indicated in their stipulations joined Mr. Loce in defending human life, in seeking to prevent the destruction of a human being.

And their efforts that day failed, but was their reason for being on the premises. These are not persons who are opposed to the law of our society.

The law of our society should be based upon reason. Roe vs. Wade is not based upon reason. It does not conform with reality. So that despite the fact

your Honor has found them guilty, and your Honor mete out sentence. I would ask you in mitigation of the severity of the penalty to take into consideration that these were not street criminals in the sense that they were attempting to disrupt the laws of society.

They were attempting to guard civilization and protect human life. So I would ask that your Honor take that into consideration in giving sentence as to all those defendants.

MR. MULLANEY: Your Honor, law is ultimately an embodiment of values and values are permanent from, more permanent than independent of the law itself. And the conflict, as you so beautifully described is what do you do when the obvious value to be embodied by law is not only not embodied, but is ignored. The only answer to that is it's a bad law. I agree. You're absolutely right that there's -- and as Mr. Bangiola pointed out absolutely correctly in his summation at trial there's a time and place and a forum to point out when law is wrong and its remedy.

And I'd like to say that this case

has been honor to be a part of because it explored the facts, because it compared the law to what is right.

And what is right the Supreme Court does not decide is right or wrong. What is right and wrong is your connection with the greater power.

And the greater power that speaks to this particular issue is thou shall not kill. What so you do when the law says that thou shall not kill does not apply?

Where does that take a society when that concept is expanded to considerations other than the unborn. And when you give the Supreme Court the power to make the distinction as to what life is meaningful and what types of life aren't meaningful, as to who can live and who can't, where does society go.

To use the old phrase slippery slope, there's no more slippery slope for civilization than an abortion. Mr. Loce, very much to his credit, took responsibility for his acts. He looked at what the consequences of his acts were, and he tried. He saw his obligation as a father and he tried to live up to it.

I would just like to say that we will

do everything we can as we go forward with the Appellate process in this case to try and bring into congruence right values and wrong.

And that this decision by this Court is an opportunity on a very, very large scale to write right a very, very large wrong.

Now in sentencing Mr. Loce I think it is quite clear that he is a man who was acting with the greatest amount of good intention. And I would ask the Court to give him the most lenient penalty possible because given the facts of the case I think that's proper. Thank you.

THE JUDGE: Mr. Daley?

MR.DALEY: Thank you. Roger Daley and my clients are Charles Matson, Daniel Lickteig, Neal Webster, Tyrone Malone, Jeannie Henderson and Ralph Traphagen.

Your Honor, the holding and the Court is bound by Roe v. Wade, demonstrates that there's a great darkness that covers our land. That we as a people are bound by a law that allows the killing of human life. The darkness at some point must come to an end.

My people, the people that I defend

and the people I now speak for, stand in the same position I now speak for, stand in the same position that the people in Germany and in the Netherlands and France, who hid the Jew, who had the courage to stand in the place of the Jew.

My people were the same people who helped our black people escape from the South, hid them in their basements and put their own lives in danger.

Roe vs. Wade is a big legal lie. The country will not stand if it continues to proceed on that particular lie and allow the unborn to be killed with the language that George Orwell warned us about, when peace would become war and love would become hate. Roe v. Wade and all the language that surrounds this particular issue, is the very thing that George Orwell warned us of, that we would call life death.

That's what is going on. That's what is going on in this courtroom. And that's what we intend on appealing this case to the highest court of the land. Because if we do not stop this killing then we are all doomed to be judged by God.

So my people are people, who truly

care about human life. The fact that they are willing to put their lives on the line, I would ask the Court to take that into mitigation as a mitigating factor and have mercy on them as they had mercy on the children.

THE JUDGE: Mr. Prosecutor.

MR. BANGIOLA: Counsel, your Honor, there's a very provocative issue raised by your findings on the issue when human life begins.

And there's a very provocative issue raised as well by the existing status of the law governing abortion.

But I offer to the Court the other proposition which is the darkness that would exist, and the light that would exist on civilization, especially this civilization, if the orderly process of law were not followed.

And the orderly process of law in criminal courts requires following findings of guilt and a finding of guilt by a Court, a finding of an appropriate sentence based upon the status of the defendant before the bar of justice.

And in this case where do these defendant's stand as trespassers in

relationship to your Honor as sentencing court?

Now, your Honor, we should probably get on this case I would think and counsel are probably ready to tell us about the prior convictions the of the individual defendants, as to where they stand. I have a feeling Mr. Loce has never been convicted.

Is the same true for the other 14 defendants? I don't know. But these are appropriate considerations for your Honor to consider.

And I think it is appropriate, important, when the defense speaks about darkness that the court continued to take an unflinching look at this case in the area of the sentencing as well.

And an unflinching look at this case requires that sentencing be meted out as in other cases under the law, because this is what the orderly process of the law, and this is what civilization also, requires.

If we wink at the law, if we say we are sympathetic, although the law requires conviction, if we do that, we have winked at the right. We haven't faced it. We

haven't applied it.

Another court evaluating this decision is invited to wink as well.

That won't serve these defendants even if they are right. These defendants should be sentenced as other trespassing defendants based upon their prior convictions and prior criminal records, without more.

These defendants knowingly violated the law. These defendants as Mr. Daley has mentioned have placed themselves on very high moral terrain.

The analogy to people who defended Jews during the horror of the Third Reich, the people who ran the Freedom Train and the civil rights demonstrators in the south that were raised on summation again at this time, that's not an argument for mercy. That is an argument for a stiff sentence. Because none of those groups, Gandhi, and civil disobedience was referred to as well, I believe.

None of these groups pled for mercy. All of these groups recognized the consequences of their actions and rolled upon the final judgement of the civilization through the orderly progress

of the law.

This is what the law requires. This is what the law and the system in which I believe requires.

This system is important. It is as important as this case. This is our system. And if we do not uphold it, if we wink we have undermined something much, much more important than the issue in this case.

We have undermined the fundamental process of law. So, your Honor, I urge you to solicit pre sentence report on behalf of the defendants and I'd like to explore the criminal records of defendants and set sentencing down for another day.

Thank you.

THE JUDGE: All right, counsel, all counsel, as officers of the Court, I assume. I hope that you know your clients.

Is there anyone here, any defendant in this case, without me doing a criminal work up on each defendant of this case, is there anyone here who has a prior conviction specifically for trespass?

MR.TRAYNOR: Judge the general answer to that question is, yes. The specific

answer is a little more difficult.

I did not obtain a detailed record of any prior arrests of my defendants in this case, but having represented some of them before in other courts of this state for this same type of offense, 2C:18-3(b) and, I do know there have been some prior convictions.

I am not prepared at this point in response to the prosecutor's demand to say which defendant has been arrested and which has not.

I know of several that have.

THE JUDGE: When you say they have been arrested, in a similar situation?

Mr. Traynor: The same sort of case, Judge. It is no secret that the press has reported something known as Operation Rescue where these people go to a place where abortions are performed and they put there bodies in front of the door to attempt to block the door. I can say this to your Honor, and this to the counsel, that in every instance I know of where individuals have been arrested in prior arrests, they have been arrested of this sort.

And your Honor should be apprised of

the fact that these individuals are not in the line of Gandhi and the civil rights demonstrators who sought to vindicate the rights or freedom of themselves, to expand their rights under the law.

These -- every individual here is what is known, properly know as a rescuer, a person who goes out to save the life of the human about to be killed.

And that's a very clear distinction. These are not demonstrators seeking to -- they are demonstrating to elevate the public consciousness.

There is no question about that, to attempt to restore society to civilization to the notion of civilization.

But beyond that the specific incident that they are there for is to rescue, in this case, Mr. Loce's baby, a human being, from destruction.

That is not in the line of Gandhi or the civil rights demonstrators in the south.

That is in the nature of the people who violated the law against siding slaves who were condemned under the Fugitive Slave Act and who exposed themselves to jeopardy under the Fugitive Slave Act.

I can represent as an officer of the Court that notwithstanding the fact that there were prior convictions, they have all been convictions of the nature that I'm describing.

And that, I believe, would permit this Court in view of your ruling today that human life begins at conception, that upon that representation you could make your sentencing today.

MR. DALEY: Your Honor, my client Jeannie Henderson, does not have any prior convictions.

MR.MULLANEY: Mr. Loce hasn't had any convictions, your Honor.

THE JUDGE: First of all, I take into consideration that this was basically a non-violent situation.

And I also take into consideration the unique aspect of this case that the father -- the individual whose offspring was aborted, was involved in the trespass and that was Mr. Loce.

And other evidence as I understand it is such that they passively locked themselves up in the doctor's office and had to be removed. I don't have any complaints for assault and battery on a

police officer or for that matter any assault and battery charge within all those complaints.

So I am faced with what is arguably a passive resistance or passive trespass not withstanding the fact that they did forcibly enter according to the facts of the case.

And, of course, their entry was without permission, and took place after they were told not to enter and it was a defiant trespass.

But because of the unique circumstances of this particular case, especially since it involves the individual whose offspring was aborted and because of the non-violent aspect of the case, I am prepared , notwithstanding the fact there are other trespass convictions for some of the defendants, I am prepared to sentence at this time.

I am also cognizant of the fact that Mr. Loce went all the way up to the New Jersey Supreme Court in this case prior to entering the doctor's office to prevent the abortion of his offspring.

So that in that respect he did exhaust accordingly, his remedies, so to

speak. But what he did do was wrong. What he did do was against the law.

What he did, I take into consideration that he did go all the way to the New Jersey Supreme Court to prevent this abortion, and based upon the undisputed medical testimony by arguably the foremost authority in genetics in the world. I found that human life begins at conception; and that Roe vs. Wade permits the legal execution of that human being.

And because of those findings of fact, because of the nonviolent aspect of this trespass, I am going to sentence all defendants except Mr. Loce to a fine of $250, $25 court costs, and $30 to the VCCV Penalty Board.

That's a fund that goes to help the victims of violate crimes which is in some ways an irony in the case.

As far as Mr. Loce is concerned under these circumstances, the fact he did have to go to New Jersey Supreme Court, was denied, and the fact he was non-violent in his attempt to save his offspring, there is no fine.

Good afternoon.

MR. MULLANEY: Thank you, your Honor.

MR. TRAYNOR: Judge, would you stay the penalty pending appeal?

THE JUDGE: Yes, but I want the appropriate paper work. You know what the rules are as far as the ten day period, the filling of the stay. I will stay it. No problem.

THE JUDGE: Wait. Gentleman, my clerk has just informed me, she's my right-hand man er woman I would say, that Mr. Loce, the State of New Jersey says that you must pay $30 for the VCCV Penalty Board, so you must contribute $30 because of your conviction to the Victims of Violent Crimes.

MR. MULLANEY: Fine, your Honor.

THE JUDGE: So that's what you owe. The rest of you $250. $25 to court costs and $30 to the VCCV Board. Take it easy. (Hearing adjourned)

I HEREBY CERTIFY that this is a true and accurate transcript of the proceedings as taken stenographically by me at the time and place hereinbefore set forth.

SUZANNE HAUSER, C.S.R. XIO1414
A Notary Public of the State of New

Jersey

91 MC 108

In the Eighteenth Judicial District Court, Sedgwick County, Kansas Criminal Department

CITY OF WICHITA, PLAINTIFF RESPONDENT vs. ELIZABETH A. TILSON, DEFENDANT APPELLANT

MEMORANDUM OF OPINION FOLLOWING BENCH TRIAL

In compliance with the provisions found at K.S.A. 22-3609 and K.S.A. 12-4601, Mrs. Tilson appeals a ruling made by the Municipal Court of the City of Wichita, Kansas, wherein she was found to have violated a city ordinance prohibiting "criminal trespass" (5.66.050, 12-31-89, the Code of the City of Wichita, Kansas) for which she was ordered to pay a fine of $1,000.00, serve six (6) months in the Sedgwick County Adult Detention Facility, and pay court costs of $27.00. She has waived her right to trial by jury (Kan. B.O.R. Sec. 10; U.S. Constitution, Am. 6).

August 3, 1991 is the date of the occurrence resulting in the prosecution. The place was within the corporate city limits of the City of Wichita, Kansas.

Those participants whose actions on the date of occurrence are material to the issues presented here are as follows:

A corporate entity was there. It was an Ohio, for-profit corporation, authorized to do business in the State of Kansas. To do its business, the company kept a commercial building on real property at the place of occurrence. It invited the public there to purchase a service from the corporation. The company hired physicians to render the service. the service was the performance of certain medical procedures that result in the termination of pregnancy other than by live birth.

Certain members of the public were there that day as business invitees. they were there to purchase the service.

Mrs. Tilson was there on the date of the occurrence. Here are a few of the reasons:

"Because I know that they perform abortions there and abortion takes the life of an unborn baby and I wanted to prevent that and I wanted to prevent the detrimental effect

that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved."

"Because that was the date that the pastors were going to rescue and many of my friends were there and I felt impressed by the Holy Spirit to be there."

The evidence proffered to prove those acts of the participants done on the date and at the place of the occurrence that precipitated the prosecution of Mrs. Tilson are summarized below:

Mrs. Tilson entered upon the corporate property as any other member of the public could do. She did not, however, enter the building. Her purpose was not to purchase a service. Her purpose was to stand on the walkway in front of the entrance so as to impede those business invitees trying to enter the company's building to purchase the service offered there. While so situated, she did not say nor do anything except perhaps participate in a song of praise or a prayer to the same "Supreme Judge of the World" upon whom Messrs. Hancock, Adams,

Jefferson, Franklin, Clark and their colleagues at Philadelphia in 1776 relied " for the rectitude of [their] intentions..." (The Declaration of Independence., Kansas and the United States Constitution Pg.159 & 160, 1988). The police say that they heard such activity.

Mrs Tilson testified that by hindering the purpose of the corporate business invitees, she hoped to give others united in cause with her an opportunity to ask the invitees to reverse their decisions to buy the corporation's service. Mrs. Tilson calls these colleagues of hers "sidewalk counselors." Her colleagues were in place on the public sidewalks and certain real property adjoining the corporate real property for the purpose of attracting the attention of the business invitees through verbal or visual communication and thereby endeavor to dissuade the invitee.

Mrs. Tilson takes umbrage at any attempt to label her an "abortion protestor." She says that she was not there to protest anything. Her goal was to "rescue" the unborn, their progenitors

and the families of both from the ill effects that might follow termination of pregnancy.

At this stage the police were summoned to the place of occurrence and asked by the corporate "authorized person" (5.66.050, Code, City of Wichita, Kansas, Supra, ibid) to remove any person from the premises who was not there to purchase or participate in the service offered by the corporation.

A Deputy Police Chief of the City testified at trial that he broadcast this request in such a way that Mrs. Tilson did or should have known of it. She did not move. A police officer then placed her under arrest for criminal trespass. She accompanied the policeman to jail without further incident (State's Exhibit No. 1).

Exhibit No. 4 is the city ordinance in question here. That part pertinent is this:

"Criminal trespass is...remaining upon...any land... by a person who knows...she is not authorized or privileged to do so, and: (a)such person...remains therein in defiance of an

order...to leave such premises... personally communicated to such person by ... [an] ... authorized person:...

Mrs. Tilson violated the ordinance. She admits as much under oath, thereby removing any reasonable doubt left following the City's case in chief. She asks for a finding of not guilty, however, claiming at Page 3 of her trial brief , that :

"...she was justified to go on the property ... as such entry was necessary to protect human life and health. ...such entry ... is a lesser evil than either the taking of the lives of the babies ... or the potential harm to mothers, and other affected persons..."

The defense of justification by necessity relieves her of criminal responsibility under the facts here, she says.

The City contests the applicability of the defense of justification by necessity. At Page 12 of its trial brief, the reason is stated in this way:

"... because the harm (abortion) sought to be prevented is not a legally recognized injury ..., there were legal alternatives available to the defendant. ... the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime. ..."

At common law, justification by necessity developed as a doctrine whereby under certain factual situations, the perpetrator is forgiven an act otherwise criminal.

The mind set supporting the doctrine is set out in a part of Magna Carta (15 June 1215) where those men, who for one brief moment of time were charged with administering the government, reaffirmed by mutual agreement that:

"No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison excepting by the legal judgment of his peers, or by the law of the land. To none will we sell, to none

will we deny, to none will we delay right or justice."

The first ten amendments to the Constitution of the United States (25 September 1789) are but reaffirmation of these basic principles of freedom following more than 500 years of practice. All 16 amendments following find root there.

The Bill of Rights incorporated into the Constitution of the State of Kansas (proposed 29 July 1859; adopted by the people 4 October 1859) is but a reaffirmation of the same basic principles following 644 years of practice.

The common law is whence our jurisprudence evolved in North America. In Kansas our Supreme Court said:

"From the beginning of our history, the common law of England has been the basis of the law ... and except as modified by constitutional or statutory provisions, by Judaical decisions, or by the wants and needs of the people, it has continued to remain the law of this state." (Clark vs. Allaman,

71 Kan. 206, 80 Pac. 571; Fergus vs. Tomlinson, 126 Kan. 427,268 Pac. 849; State, ex rel vs. State Bd. of Ag., 158 Kan. 603 at 605, 149 P. 2d 604; In re Frye, 173 Kan. 392; 246 p.2d 313; Gonzales vs. A.T.S.F., 189 Kan 689, 371 P 2d 193; Hoffman vs. Dantel, 192 Kan. 406, 388 P. 2d 61)

In Perkins on Criminal Law (Foundation Press, Inc., 1957) at page 848, justification by necessity is explained in this manner:

"Where the act done was necessary or reasonably seemed to be necessary , to save life or limb or health, and did not in itself in any way endanger life, limb or health, the exculpatory effect of necessity is too clear for argument; but where the offense charged is not one of particular gravity, the courts have not hesitated to recognize necessity as an excuse where the danger or apparent danger to be avoided was less serious in its nature. Thus one unavoidably caught in a traffic jam is not guilty of violating the

law which forbids stopping at that place, and a carrier has not violated the statute which requires a specified coach if the failure to provide that coach on a particular trip was due to an unavoidable accident which ordinary prudence could not have guarded against.

These are not situations, it should be noted, in which no choice is possible. The driver elected to stop rather than proceed until his vehicle was brought to a halt by actual contact with the one ahead, and the carrier could have avoided sending the train without the specified coach by sending no trial at all. The harm threatened in these cases, moreover, is not to life or limb or health. The motorist is excused for stopping even if proceeding so slowly that the bumper-to-bumper contact would cause neither personal injury nor appreciable property damage, and the carrier would have suffered only financial loss by complying with the letter of the law. In another case, it may be added, the court reversed a conviction of killing a deer in violation

of the game laws because it was shown this killing was reasonably necessary to prevent substantia; damage to the defendant's property."

The federal courts recognize the doctrine (U.S. vs. Simpson 460 F.2d 515, 9th Cir. 1972; U.S. vs. Seward, 687 p.2d 1270, 10th Cir. 1983).

Neither party cites Kansas case law treating the doctrine. State vs. Taylor, (138 Kan. 407, 26 P.2d 598), though not dispositive, is instructive, is instructive on the subject. The defendant had appealed his conviction, claiming error in an instruction given the jury at his trial. It seems that defendant and his wife were estranged with the wife and children taking shelter at her brother's house. Defendant appeared there and in spite of his wife's protestations, exercised his parental right to custody of a child. Defendant shot the brother because he tried to intervene in defendant's efforts to exercise his parental rights.

The jury instruction complained of, in that part pertinent, explained the law

in this manner:

11. The defendant, George Taylor, and Bessie Taylor, his wife, ordinarily would have an equal right to the custody of their children, and either one of them would have the right to repel, reasonably, any invasion of their right to such custody; however, I believe that if the defendant, George Taylor, and his wife were estranged, and Bessie Taylor had for some time had the unopposed possession of her children, and there was an attempt on the part of George Taylor to take one or more of his children from her by force, over her objections, then her brother, Everett Christenson, would be justified in rendering her such reasonable assistance as might be necessary to prevent able George Taylor from taking any of the children away from her. On the other hand, Everett Christenson had no right to the care, custody or control of the Taylor's children, independent of the desires or wishes of his sister, Bessie Taylor, and if, of his own motion, he interfered with George Taylor, then Taylor would be

justified in enforcing his right to the custody of the children..."

The Supreme Court of Kansas said of the instructions (page 413) "We think they were a fair statement of pertinent law."

The City claims that "the legislature has effectively excluded the prevention of abortion as a justification for the commission of a crime..." (page 12, trial brief). At closing argument, the City pointed to H.B. 2646 Sec. 6(a) (2) where the legislature did in part define criminal trespass as:

"... (2) entering or remaining upon private land or structure in a manner that interferes with access to or from any health care facility..."

That law (H.B. 2646) is effective from and after July 1, 1992. It does not have the effect on this case that the City would give it.

I will this day hold that the doctrine of justification by necessity was legally recognized in the State of Kansas on August 3, 1991. The roots are anchored

in common law. The purpose is to protect the people from their government by an assurance that in all matters right will be done and justice rendered.

The doctrine is found at A.L.I. Model Penal Code, Sec. 3.02. It is instructive as a guide for practical application. These are the elements:

"(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and © a legislative purpose to exclude the justification claimed does not otherwise plainly appear."

As aforesaid, Mrs. Tilson admits violation of the ordinance. No "legislative purpose to exclude" the

defense is applicable to this set of facts. No exceptions or defenses are set out in the ordinance or other law.

The provisions of (b) and © above contain no exclusion of the doctrine. We will then turn to the provisions of (a).

The "harm or evil" sought to be avoided by Mrs. Tilson through her violation of law on August 3, 1991 was premature termination of pregnancy and the harm that may flow therefrom.

The City argues that premature termination of pregnancy not "harm or evil" nor is it a wrong to be compared with Mrs. Tilson's defiance of a police order because Roe vs. Wade, (401 U.S. 113, 35 L.Ed 147, 93 S.Ct. 705) set the law whereby the constitution guarantees a right whereby a pregnant woman, during the first trimester, may make a decision whether to terminate her pregnancy without governmental interference in that decision.

Those are positions. To resolve the issue, we need to explore some general concepts of constitutional law, the history of law in Kansas and apply the same to the facts.

Every female at the site of occurrence on August 3, 1991 had a right to make an individual decision whether to terminate pregnancy (Roe vs. Wade, Supra). Any member of the public there that day had a right to purchase a service from the corporation.

The corporation had a right to do business there on that day. It was so authorized by the State of Kansas.

Mrs. Tilson had a 1st Amendment (United States Constitution) and Section 11 (Kansas Constitution) right to express her opinion on any subject concerning governmental action or nonaction. Her opinion could be expressed by action, nonaction or words (Texas vs. Johnson, 491 U.S. 397, 105 L.Ed.2d 342, 109 S.Ct. 2533; U.S. vs. Eichman, e't al, 496 U.S. 110 L.Ed.2d 287, 110 S.Ct.).

None of these individual rights are subservient to others. As with all constitutionality protected rights, each here involved has parameters (Burson vs. Freeman, 504 U.S. , 119 L,Ed. 2d 5, 112 S.Ct Decided May 26, 1992; Michigan Department of Police vs. Sitz, et al, `96 U.S. , 110 L.Ed.2d 412, 110 S.Ct.

(1990); Roe vs. Wade, Supra; State vs. Cleveland, 205 Kan,. 426, 469 P.2d 251; State vs. Great American Theatre, 227 Kan. 633, 608 p.2d 951; State vs. Crouch, 92 Kan. 602, 389 P.2d 824). The Bill of Rights, federal and state, is law that protects the people from their government. Neither was meant to protect people from citizens (Purdeau vs. McDowell, 41 S.Ct. 574, 65 L.Ed. 1048, 256 U.S. 465).

The City of Wichita's ordinance prohibiting "criminal trespass" (Ex. 4, Supra) protects the right of a corporation and its business invites to do lawful business without interference. In this particular case, the ordinance can be viewed as establishing parameters on Mrs. Tilson's right to be on business property for the purpose of expressing an opinion.

When Mrs.Tilson remained on the corporate property in defiance of an order... to leave such premises... personally communicated to..." her by the police, she violated the law. The question then becomes is her violation excused by the doctrine of justification by necessity under the facts here presented?

Mrs. Tilson points out that her act of defiance "did not in itself in any way endanger life, limb or health" (Perkins, Supra).

The City's evidence proves that the corporation did business on August 3, 1991, but only after Mrs. Tilson was removed by the police.

The defense evidence shows that the corporation lost business that day, perhaps indirectly by Mrs. Tilson's conduct. A Ms. Tina McLaughlin gave evidence at trial. She said that she went to the scene of the occurrence on the day Mrs. Tilson was there. She was a member of the public, there to have a medical procedure done for the purpose of terminating her pregnancy. Ms. McLaughlin left the scene because of the activity there before she had the medical procedure. She later made contact by telephone with Mrs. Tilson's colleagues and made an appointment to talk. After the talk, she reversed her decision to terminate her pregnancy prematurely. Her pregnancy went to term , whereupon a normal, healthy girl was delivered. The girl is named Destiny. She sat on her

mother's lap during the testimony of her mother.

The overall evidence proves that those members of the public there that day as business invitees were at the least inconvenienced and at the most, obstructed because of Mrs. Tilson's act. No one was prevented from carrying out a decision to terminate a pregnancy that day, so far as the evidence shows.

Mrs. Tilson was on that day a housewife and mother from Wichita, Kansas, whose formal education terminated prior to the 12th grade, but who has been awarded a Kansas State High School Equivalency Diploma (K.S.A. 72-4530; K.A.R. 91-10-1). Her training in obstetrics and gynecology is limited to the practical gained through experiences as a mother and woman, so far as the evidence here shows. As to the fields of human genetics and histogenesis of homo sapiens while en ventre sa mere, her knowledge comes from a magazine article (Life Before Birth, Life, April 30, 1965; Defense Exhibit B). Practical experience gained by personal actions and observations in human relationships constitute her psychological knowledge.

So far as the evidence here proves, she probably has limited knowledge of and little interest in concepts of constitutional law evolving as American jurisprudence from common law of England.

She sees through her heart. Her inner voice tells her that the premature termination of pregnancy by surgical procedure terminates life By intuition, she maintains that it can also cause great psychological harm to "the woman , the father of the baby, the grandparents, and brothers and sisters involved." It was intuition that drove her actions on August 3, 1991. she did what she thought was right, but it is law of the land from where the light comes to judge whether or not her actions were justified under law.

To prove her point that the service offered by the corporation on that day terminated life, she offered the testimony of experts. From Paris, France, she called to testify one Dr. Jerome LeJeune. He holds doctorate degrees in medicine and science. He has for the last 40 years divided his time between the practice of medicine and research of human genetics in teaching environment. His credentials

prove that he is at this time recognized by the scientific community as the world's expert in the field of human genetics. Pathology of the chromosome is his particular specialty.

Dr. LeJeunes is of the opinion that human beings (homo sapiens) begin life at conception. He gave reason for his opinion certain scientific facts. A few are set out here. When the ovum donated by the woman is fertilized by the sperm from the man, all ingredients and all instructions necessary to make a human being are therein contained. The new human has a unique genetic organization. The mother is the sole source of shelter and vital fluids for the term of the pregnancy. This need not be the biological mother; any woman's body will do so long as the recipient's body is in the same stage of ovulation as the donor. The new being forms all its own body systems, to include circulatory. It is "a little man in a space capsule," Dr. LeJeune says.

In further support of his opinion, Dr. LeJeune points out that tests done after the fertilized ovum has divided one

time shows the protein of the new being is distinct from its progenitors.

The "D.N.A. bsr code" - now popular in criminal identification (K.S.A. 1991 Supp. 21-2511) is present after the eighth division from fertilization. At 90 days from fertilization, all systems are fully developed. The fingerprints and palmprints are present and could be taken and recorded at that time. Those will be the same forever. Growth of the new being and its various organs continue for 25 years after fertilization, the doctor testified.

Dr. Thomas Hilgers was called from Nebraska to give evidence. He is a medical doctor, certified as trained in obstetrics and gynecology. His speciality is reproductive medicine. He has 20 years experience in his profession. He has authored several books and scientific papers of significance in his field.

Dr. Hilgers opens that life for the human being begins at conception. Through him, certain exhibits were brought as evidence, meant to prove his point.

Exhibit D is a video tape made by the witness. It was nine years in production.

It depicts scenes meant to demonstrate development of homo sapiens in utero from conception through a few minutes after normal, live birth. Sonogram is the primary tool used for the depiction of Exhibit D. All the subjects where sonography is used are live patients, pregnant at the time. It shows, among other things, considerable embryonic movement before the mother can feel it within her body. It shows fertilization, then heart beat at 16 days following.

The witness says that brain waves have been demonstrated at 42 days after fertilization in humans. His experience is that 12 weeks from fertilization, all normal, well-baby reflexes are present in the new being and at approximately 22 weeks gestational (20 weeks after fertilization, all normal, well-baby reflexes are present in the new being and at approximately 22 weeks gestational (20 weeks after fertilization) the body of the mother is not necessary for the further life of the new being, given modern medical techniques, Dr. Hilgers explains.

Vincent Montgomery Rue, Ph.D. was called by Mrs. Tilson. His qualifications

fill 13 pages (Defendant's Exhibit O). He is recognized in his field as one of the world's leading experts on the post psychological ramifications, diagnosis of mental illness arising therefrom and treatment therefore of those persons so affected following the voluntary premature termination of pregnancy. His patients over the years have included mothers, fathers, siblings and grandparents suffering the symptoms ascribed to a diagnosis of post-traumatic stress disorder (D.S.M. III 309.81 Axis IV (pg. 26) - Physical Injury or Illness as a Stressor). It follows a feeling of guilt or a sense of loss, Dr. Rue says, both natural occurrences in the psyche of human beings.

From Jackson, Mississippi, Mrs. Tilson called a physician named Beverly McMillan, who specializes in obstetrics-gynecology. She has performed numerous procedures that result in the premature termination of pregnancy. By testimony and demonstrative aids, she explained the four medical procedures used to terminate pregnancy. She testified that each procedure results in termination of life

at the time or within minutes of the time of the procedure. According to Mrs. Tilson, the purpose of this evidence is to show the threatened harm she was trying to stop was imminent.

What Mrs. Tilson has proven by her witnesses LeJeune, Hilgers, and McMillan is that genetically, histologically, obstetrically, and gynecological, the scientific community is of the opinion that life in homo sapiens begins at conception and continues on for an average life span unless interrupted by trauma or disease.

With witness Rue, Mrs. Tilson proves the scientific community is of opinion that great harm can occur to any number of persons joined in interest following termination of pregnancy other than by natural birth.

This scientific evidence of Mrs. Tilson's demonstrates that the scientific community has proved through research and discovery what Mrs. Tilson believes by intuition.

The City's objection thereto is that this evidence is not relevant to the issue being litigated (K.S.A. 60-401(b)). The

City does not contest the truth thereof.

To determine the relevancy of Mrs. Tilson's evidence, as well as the validity of her defense, it is necessary to note the law applicable on August 3, 1991 at the place of occurrence, particularly that pertaining to the issue of whether or not the voluntary premature termination of pregnancy is wrong or harm with Mrs. Tilson's defiance can be compared.

The voluntary premature termination of pregnancy was at common law deemed a criminal act. William Blackstone (1723-80) wrote that:

"To kill a child in its mother's womb is now no murder, but great mis prision," (W. Blackstone, 4 Commentaries on the Law of England 198).

At 1 Hale's P.C. 429 (cited in State vs. Harris , 90 Kan. 807 P.), the law of England in the year 1670 is stated in this way at page 812:

"But if a woman be with child and any gives her a potion to destroy the child within her, and she takes it and

it works so strongly that it kills her, this murder..."

The Kansas Supreme Court in State vs. Harris was interpreting a statute that had been the law of Kansas since territory days whereby the legislature made "it a misdemeanor willfully to administer to any pregnant woman any medicine, drug or substance or use any instrument or means with intent thereby to produce abortion or the miscarriage of such woman, unless necessary or medically advised to be necessary to preserve life," (Terr. Stat. 1855, Ch. 48, Sec. 39' G.S. 1868 Ch. 31, Sec. 44; R.S. 1923 21-437; G.S. 1949 21-437).

Our Supreme Court reasoned in Harris that the act of intentionally terminating a pregnancy was one male in se. In support of such reasoning, other cases were cited within the opinion. Here is a part:

"The act was not only immoral, Violative of the law of nature and deliberate in character,

but reckless of life and wrongful per

se"(At Page 814)

"At common law life is not only sacred but it s inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother."

It is instructive to note the court's reference to the beginning of life at page 817:

"The arbitrary refusal of the common law to regard the fetus as alive in such cases until quick was based on no sound physiological principles. Becl makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most disastrous consequences to the mother must have already been suffered (1 Beck Medical Jurisprudence 464-467).

Mrs. Tilson's scientific evidence seems to prove what the Supreme Court of Kansas believed in 1913.

The same statutory law interpreted in Harris, Supra, became G.S. 1923, 21-437.

Here is the statute defining Kansas state policy:

"Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug or substance whatsoever or shall use or employ any instrument or means whatsoever with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such a woman, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail not exceeding five hundred dollars or by both such fine and imprisonment."

The same state policy was codified at G.S. 1949, 21-437.

The Supreme Court of Kansas in 1953 at Joy vs. Brown 173 Kan. 823, 252 P.2d 889 @ Page 839) noted that the above statute was one of three enacted:

"For the purpose of protecting the life not only of the unborn child, but that of the mother ..."

"The state has a vital interest" in both, the court said in the same opinion.

The statute was repealed in 1969 (Chap. 180, Page 503, 1969 Ses. Laws of Kansas).

July 1, 1970 (Ses. Laws of Kan. 1969, Chap. 180, Sec. 21-3407) is the effective date of the legislative enactment that replaced G.S. 1949 21-437, Supra. The replacement statute provided that:

"(1) Criminal abortion is The purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth. (2) a person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a

continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse; and either; (a) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such other place as may be designated by law; or (b) an emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother. (3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child (2) Of this section all illicit intercourse with a female under the age of sixteen (16) years shall be deemed felonious. (5) Criminal abortion is a class D felony."

K.S.A. 65-443 is of interest. It goes to the general policy of the State of Kansas. There it is provided that:

"No person shall be required to perform or participate in medical procedures which result in the termination of a pregnancy and the refusal of any person to perform or participate in those medical procedures shall not be a basis for civil liability to any person. No hospital, hospital administrator or governing board of any hospital shall terminate the employment of, prevent or impair the practice or occupation of or impose any other sanction on any person because of such person's refusal to perform or participate in the termination."

Another statute illustrative of state policy in the area is K.S.A. 65-2837. That part pertinent here is this:

"(b) 'unprofessional conduct' means: (5) performing, procuring or aiding and abetting in the performance or procurement of a criminal abortion."

The statute applies to all persons

licensed by the State Board of Healing Arts (K.S.A. 65-2812).

In 1972 the United States District Court for the District of Kansas declared (339 F.Supp.986) Section 2(a) of K.S.A. 21-3407 violative of the equal protection clause of the 14th Amendment to the U.S. Constitution.

It is not necessary to decide here what, if any, ramifications the federal District court's opinion may have had on prosecutions for violation of the statute in Kansas, because in January, 1973, the Supreme Court of the United States handed down Roe vs. Wade, Supra, and its companion case, Doe vs. Bolton, (410 U.S. 179, 35 L.Ed.2d 201, 93 S.Ct. 739, reh den 410 U.S. 959, 35 L.Ed.2d 694, 93 S.Ct 1410).

Insofar as concerns the resolution of the issue here, the ruling in Roe is best summarized by the reporter of decisions at page 155, Paragraph 3, where it is written that:

"State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure

on the mother's behalf without regard to the stage of pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. ...(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may if it chooses, regulate and even proscribe, abortion except where necessary, in appropriate medical judgement, for the preservation of the life or health of the mother."

Doe, Supra, rendered unconstitutional any attempts by the legislature to impose into the decision to terminate a pregnancy the

concurrence of physicians or groups other than the pregnant woman's personal physician and herself.

When K.S.A. 21-3407 is viewed in light of Doe, Supra, with the guidance of that rule of statutory construction laid down in State vs. Trudell (243 Kan. 29, 755 P.2d 511) where, in part, at Syl. 2, the court said that "... a criminal statute, with its punitive effect, must be strictly construed against the state ..." it is clear that the statute is unconstitutional on its face.

The legal history of Kansas teaches that as a matter of public policy, the act of voluntarily terminating a pregnancy prior to term has been considered a wrongful act except when done under strict guidelines. The purpose is to protect the life of the unborn child and the mother (Joy vs. Brown, Supra). Roe, Supra, and Doe, Supra. dec;ared a qualified constitutional right protecting a woman "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy, "(Casey vs. Planned Parenthood of Southeastern Penn., et al, 1992 W.L. 142546, decided June 29, 1992);

but left the state government with a legitimate interest in both the woman and the premature life during the entire period of pregnancy (Roe, Supra; Webster vs. Reproductive Health Serv., 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989); Casey, Supra; see also Joy vs. Brown , Supra).

It may be said that on August 3, 1991, a pregnant woman in the State of Kansas had an unqualified right to undergo a medical procedure meant to terminate her pregnancy at any time prior to term. Roe vs. Wade, Supra, and Doe vs. Bolton, Supra (1973) rendered K.S.A 21-3407, Supra, constitutionality void. Perhaps that is why there were no reported cases of prosecution thereunder during the 20 year life of the statute. The legislature took no action during the 18 years following. The Supreme Court of Kansas, during the same time period, did not act on the particular issue but did find that the unborn are not human being at any stage of pregnancy so far as the law of criminal homicide is concerned (State vs. Green, 245 Kan. 398; 781 P.2d 678; State vs. Trudell, Supra).

Mrs. Tilson says that this unqualified right to terminate a pregnancy at any stage contradicted the state's historical public policy. That is the wrong with which her defiance, of the City's criminal trespass ordinance must be compared, she maintains.

In addition to the argument that the woman's right to terminate is not wrong, the City argues (Tr. brief, Supra) that alternatives to law-breaking were available to Mrs. Tilson on that day.

Mrs. Tilson's evidence on that point proves that she had, prior to August 3, 1991, made contact with the legislature, federal and state, by telephone, writing and lobbying. She has protested the government's action in Roe vs. Wade, Supra, and the Kansas state government's nonaction following. She has peacefully assembled to petition her government for a redress of what she felt to be a grievance. She has exhausted her alternative remedies. The City's point is not well taken.

I will find that the City's evidence (Through Ms. Riggs) meant to show that the corporation's services were sold only to

those pregnant women in the first trimester of pregnancy is not credible. The same is disbelieved.

I will find Mrs. Tilson's evidence proffered through witnesses LeJeune, Hilgers, McMillan and Rue relevant to the issue here. The entire evidence of her experts is admitted. The evidence proves that the medical and scientific communities dealing with the subject matter on a daily basis are of opinion that life in homo sapiens begins at conception; and harm is result of termination of life under most circumstances.

That opinion--as a proposition based on intuition in earlier years--has always been foundation for the public in Kansas (State vs. Harris, Supra; Joy vs. Brown, Supra)

The City argues (page 4, above) that Roe vs. Wade, Supra declares that the voluntary termination of pregnancy cannot be a harm because it is legal. That is too broad an application.

Neither Roe vs. Wade, Supra; its companion case Doe vs. Bolton, Supra; nor their progeny (Webster vs Reproductive

Services et al, Supra; Casey vs. Planned Parenthood of Southeastern Penn., Supra) worked to abrogate the public policy of the State of Kansas that the voluntary act of prematurely terminating a pregnancy without qualifications is a wrongful act. Those federal cases only qualified that policy by constitutionality guaranteeing to each woman in Kansas or elsewhere a "qualified right" (Roe, Doe, Webster, Casey) to decide whether to terminate her pregnancy.

The act of termination of pregnancy without qualifications, always violative of state policy as mala in se, was not by statute prohibited on August 3, 1991, given the peculiar state of affairs caused by the action of federal government (Roe vs. Wade), combined with the inaction of the state government.

The wrongfulness of The act (i.e. unqualified termination of pregnancy) is what must be compared with the wrongfulness of Mrs. Tilson's act of interfering with the right of a corporation and its invitees to engage in lawful business.

The courts in Kansas by tradition

have been a place where citizens find a forum at which all with grievances can be heard, their actions measured by proper application of law, under an assurance that right be done and justice administered in every instance.

I will find that the doctrine of justification by necessity is applicable to the facts of this case. The facts of the case must be viewed in light of the law on August 3, 1991.

The doctrine is applied by weighing the two wrongs, while comparing the harm each seeks to avoid. The weighing must be done while balancing constitutionality guaranteed activities associated with these acts. The weighing and balancing must be done in light of the peculiar facts of the individual case.

The legislature of our state has acted since and perhaps in part because of Mrs. Tilson's defiance. It has by House Bill No. 2646 (effective July 1, 1992) reaffirmed the state's policy discussed above by exercising control of and regulating the act of voluntarily terminating a pregnancy prior to live birth. The legislature addressed the

situation where citizens might do the same act as Mrs. Tilson did here.

Since Mrs. Tilson's defiance, the Supreme Court of the United States has reaffirmed the constitutional right of a woman to "decide whether to terminate her pregnancy," (Casey, Supra) prior to viability of the new life.

Any corporation authorized to do business and its clientele still have a right to do lawful business without inference under the law of this state.

Insofar as concerns the present matter, keeping the tradition that in all matters, right to be done and justice administered, Mrs. Tilson's wrongful act done by violating the ordinance (Supra) was done to prevent a greater "harm" to society t large than that harm those running the city government for a time sought to prevent by enactment and enforcement of the ordinance.

Mrs. Tilson's wrongful act is forgiven in the eyes of the law under the doctrine of justification by necessity. She is discharged from further responsibility in the case.

The City's ordinance is still the

law, even though certain application of it may be subject to interpretation in light of the provisions of H.B. 2646, but that is a subject for another day.

As in all legal matters, this case is decided on the peculiar facts of this particular case. It is not dispositive on any other matter whatsoever.

The length of this opinion can be attributed to the important of the subject matter addressed.

Judge Paul W. Clark

July 20, 1992

DECISIONS

First Judicial Department

NEW YORK
COUNTY

CRIMINAL COURT

JURY PART 10

Judge Espinoza

PEOPLE v. JOHN GRAY, JOHN KAEHNY, CHARLES KOMANOFF, STEPHEN KRETZMANN, JONATHAN ORCUTT and ANN SULLIVAN - Each of the defendants in this case is charged with disorderly conduct (Penal Law 240.20, subdivisions 5 and 6). These charges are a result of their participation in a demonstration organized by Transportation Alternatives on October 22, 1990, at the entrance to the south outer roadway of the Queensboro Bridge, in opposition to the opening to vehicular traffic of the one lane that had been reserved for bicycles and pedestrians, during evening rush

hours.

Pursuant to an agreement with the Manhattan District Attorney's office, defendants stipulated to the facts constituting the People's direct case. In substance, they admitted their presence on the south outer roadway of the Queensboro Bridge at approximately 4:00 p.m. on October 22, 1990. They also admitted that at about 4:15 p.m., a New York City Police Officer ordered them to move, and that they did not comply with that order until they were placed under arrest, at which time they moved voluntarily and did not resist in any way.

In return for this stipulation, the prosecution agreed not to offer any objections to the presentation of a necessity defense by these defendants.

a non-jury trial was held before this Court on February 5th and 6th 1991. The People's case consisted of the above-mentioned stipulation. Defendants presented their own testimony, as well as that of several witnesses, including Dr. Steven Markowitz, a specialist in community medicine with the Division of Environmental and Occupational medicine at

Mount Sinai Medical Center and former Commissioner of Transportation, Ross Sandler, as expert witnesses. Several exhibits consisting of Department of Transportation memos were then entered into evidence by the People as rebuttal.

The Necessity Defense and Citizen Intervention

New York Penal Law Section 35.05(2) provides:

> Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute as offense is justifiable and not criminal when:
>
> Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such

injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

The necessity and justiciability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would if established, constitute a defense."

Extensive research revealed that while judges in New York (with one partial exception, discussed infra at 17) have so far declined to rule that a necessity defense has been sufficiently established to allow the trier of fact to consider it in their deliberations in cases involving defendants who have engaged in citizen intervention/civil disobedience, numerous state trial judges. In other jurisdictions, as well as some federal

District court judges, have so charged juries or acquitted defendants after bench trials in similar cases.

Moreover, when the necessity defense is actually submitted to the trier of fact in such cases, defendants have usually been acquitted (United States v. La Forge and Katt, No. Cr 4-84-66 [U.S. Dist. Ct.Minn. Nov. 8, 19984]; State v. Mouer, No. 77-246 through 77-324 [Columbia Co. Dist. Ct., Dec. 12-16 1977]; People v. Brown, No. 78CM2520-40 [Lake City, Ill. January 1979]; People v. Block, et al.[Gault Judicial Dist., Sacramento Co. Muni C.,Cal, Aug. 14, 1979] West Valley City v. Hamilton, Nos. 891003031-3 MC [Cty. Ct., Salty Lake Cty., Utah, 1990]; People v. Jarka, Nos. 002170, 002196-212, 002214, 002236-002238 [Cir.Ct. of Lake City, III April 1985]; Washington v. Karon, No. J85-11-36 [D Wash., Dec. 10,1985]; People v. Alridge, No. 49091 [Sunnyvale-Cupertino Jud. Dist., Santa Clara Co. Muni Ct., May 21-23, 1979]; People v. Lemnitzer, No. 27106E [Pleasanton-Livermore Judicial District, Almeda Co. Muni Ct., 1982]; People v. Boelcke No. 101194-101203 [52nd Jud.

Dist., Jan.7-12,1985] Chicago v. Mayer, 308 NE2d 601 [III, Sup. Ct. 1974] [conviction reversed, def. entitled to necessity defense]; California v. McMilian, [San Luis Obispo Jud., Dist. #D005, 18, 1988] [long written opinion upholding necessity defense]; Michigan v. Jones, Michigan v. Heyer [Dist. Ct., Oakland Co., 52nd Dist. 1st Div. Nos. 83-101194-101228,1985] California v. Action PL-341/55 (S. Coast Jud. DisL.Santa Barbara Co. #282899, 1987); Massachusetts v. Scott Schaefier-Duffy, PL-426/57 Worchester Dist. Ct. [1989]; Commonwealth v. Ansellem, No. 84-CR 3137 [Hampshire Dist. Ct.o [Mass. 1984]).

While far from an exhaustive listing, these cases are representative of the range of perceived harms against which defendants' actions have been found to be justified; including the effects of nuclear weapons and nuclear power.

There are also a number of cases in which charges were dropped after the judges rulings that a necessity defense would be permitted (U.S. v. Braden, PL-139/20[WD KY [1985]; New Jersey v. Driscoll, PL-172/50[Muni Ct., New

Brunswick, #55484432,1986]; Colorado v. Keranen,PL-161/50 [Co. Ct. Boulder Co., No. 85 M2172,2204 April 17, 1986]; California v. Jerome [Muni Ct. Alameda Co. Livermore-Pleasanton Jud. Dist. #5450895 July 8, 1987].

In the opinion of this Court, the instant case presents a factual situation which clearly distinguishes it from previous cases in New York which ruled a necessity defense inapplicable. Additionally, upon careful examination of the history and purpose of the justification defense which has come to be known as necessity, this Court has interpreted some of the elements of this defense in a manner which departs from prior decisions in this area.

History of the Necessity Defense

The necessity defense is fundamentally a balancing test to determine whether a criminal act was committed to prevent a greater harm.

The common elements of the necessity defense found in virtually all common law and statutory definitions include the following: (1) the actor has acted to

avoid a grave harm, not of his own making; (2)there are no adequate legal means to avoid the harm; and (3) the harm sought to be avoided is greater than that committed. a number of jurisdictions, New York among them, have included two additional requirements - first, the harm must be imminent, and second, the action taken must be reasonably expected to avert the impending danger.

The concept that "one should not be punished when an act of breaking the law prevents more evil that is has caused" is an essential and a basic one in our system of law". (U.S. Commission on Reform of Federal Laws, Study Draft, section 608 [1970]).

The necessity doctrine originated in English common law and through time has become a well established principle in United States criminal law (Res Publica v. McCarty, 86 U.S. [2 Dall (1781]).

Centuries ago, an English court expressed the concept now familiar to lawyers and layman "a man may break the works of the law and yet not break the law itself...Necessity shall be a good excuse in our law, and in every other law".

(Reninger v. Fagoss, 1 Plowd 1, 75 Eng. Rep. 1 [1551]).

The basic premise of this defense is that there are times when a technical breach of the law will bring about a more desirable result than adherence to the law. It is founded on the policy that "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law" (La Fave and Scott, Criminal Law hote 9, Section 5.4(a) at 442 [1986]).

Comments to the Model Penal Code assert that recognition of a necessity defense is "essential to the rationality and justice of all penal provisions." (Model Penal Code 3.02, comment at 17).

In certain situations, this form of justification has been widely recognized. Early federal and state cases were quick to recognize that necessity is a legitimate defense in situations such as shipwrecks, fires and similar emergencies.

Examples of paradigm necessity cases include stranded starving person breaking into a house to obtain food; a person

going through a red light in a medical emergency; a policeman speeding to catch a suspected criminal; a person destroying property to stop a spreading fire; a person jettisoning cargo to save a ship and a prisoner escaping a fire (United States v. Ashton, 24 F. Cas. 873 [No. 14, 470] (C.C. Mass. 1834); The William Gray, 29 F.Cas 1300 [No. 17,694]) (C.C.D.N.Y. 1810); Surocco v. Gery, 3 Cal. 69 [1853]; United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842]).

In 1910, a California case established that when one is in peril and immediate action is required to escape injury, the reasonableness of the act is to be determined by the trier of fact (Hoff v. Los Angeles-Pacific Co,. 158 Cal. 596 [1910]).

The United States Supreme Court granted certiorari in Morrissettte v. United States, 342, U.S. 246 (1952) solely because the reasonableness of defendant's act was excluded from the jury's consideration during trial. More recently, the defense of necessity has been successfully applied in a number of prisoner escape cases which have marked a

milestone in the evolution of this defense, due to their definition of imminence of the harm sought to be avoided as well as their emphasis on the importance of allowing this defense to come before the trier of fact (People v. Lovercamp, 43 Cal. App. 3d 823 [1974] [imminence is to be decided by the trier of fact, taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm] People v. Condley 69 Cal. App. 3d 999 [1977]).

In People v. Pena, 149 Cal. App. 3d Supp. 14 [1983] the necessity defense was held applicable to situations where the threatened harm is to persons other than the defendant. Necessity was also held available to all crimes except the taking of a life of an innocent person.

Citizen intervention cases, where the perceived harms and numbers of potential victims are often more devastating than in the more traditional examples discussed above, appear to be the latest evolution in the types of cases where the necessity defense is asserted. In ruling the necessity defense applicable in such

cases, judges have clearly stated that the history and purposes of the necessity defense should guide the courts' evaluation of whether defendants have met the elements required by this defense (Vermont v. McCann, Dist., Ct. VI. Unit 2 Chittenden Cir. #2857-7-86 CNCR [1987] [judge's order permitting the necessity defense as "in the mainstream of historic currents of Western thought and jurisprudence"]).

It should also be kept in mind that:

"The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations and usages as the progress of society may require" (Miller v. Monsen, 37 N.W. 2d 543, 545 [Minn. 1949]).

Burdens of Proof in Necessity Defense

Cases

Under Penal Law 35.05(2)

Justification in New York, as defined in Penal Law Sections 35.05,through 35.30 is an ordinary and not an affirmative defense (Penal Law 35.00). When a defense, other than an affirmative defense defined by statute is raised at trial, the People have the burden of disproving such a defense beyond a reasonable doubt Penal Law 35.05(2) requires, however, that a defendant establish a prima facie case by producing evidence from which a reasonable juror could find that he has met each element of the defense.

Therefore, when seeking to establish a defense under Penal Law 35.05(2), a defendant bears the same initial burden as those presenting affirmative defenses that of establishing a prima facie case (29 Am Jur 2d Section 156 [1967]). If that burden is met, the People must then disprove the defense of necessity beyond a reasonable doubt. Unlike true affirmative defenses, defendants in cases under Penal Law 35.05(2) do not have the burden of establishing their defense by a preponderance of the evidence.

Most of the case law concerning when it is appropriate to instruct on a particular defense has been generated by jury trials. It is particularly important to clearly delineate and evaluate whether defendants have met their initial burden of production in trials involving the necessity defense, since if that questions is resolved in a defendant's favor, the burden of proof then shifts dramatically, and the People must disprove the defense beyond a reasonable doubt. This is true whether the trier of fact is a jury or a judge.

Since defendants in necessity cases share the initial burden of those attempting to avail themselves of affirmative defenses, it is instructive to review the standards courts have applied in such cases to determine whether defendants are entitled to an instruction to the trier of fact.

In New York, it has been held that affirmative defenses must be considered by the trier of fact when a minimum threshold of evidence warrants it (People v. Irby, 61, AD2d 386 [2d DepL. 1978]).

In their section on affirmative

defenses, La Fave and Scott state the following, "As to the burden of production, it is uniformly held that a defendant is obligated to start matters off by putting in some evidence of his defense unless the prosecution does so in presenting is side" (La Fave and scott, Criminal Law, Chapter I, Section 1.8) (emphasis added).

In determining whether a reasonable review of the evidence exists to support an affirmative defense, courts must therefore look to the mandate of the Court of Appeals that:

"When evidence at trial viewed in the light lost favorable to the accused sufficiently supports a claimed defense, the Court should instruct the jury as to the defense and must when so requested. a failure by the Court to so charge the jury constitutes reversible error" (People v. Watts, 57 NY2d 299, at 301 [1982]; see also People b. Torre, 42 NY2d 1036 [1977]; People v. Steele, 26 NY2d 526 [1970]).

The court notes that the "some evidence" rule has been applied in evaluating whether defendant has met his burden under the affirmative defense of

entrapment (People v. Spangraw, 55 AD2d 796 (3d Dept. [1976]; People v. McGee, 49 NY2d 48 [1979]).

The strong presumption in favor of allowing a defendant to present his alleged defenses and against ruling his evidence insufficient as a matter of law is set forth at 75 Am. Jur. 2d Trial 727, at 655 as follows:

"In criminal cases, the defendant is entitled to an instruction defining the law applicable to his theory of the case covering his defense if there is any competent evidence reasonably tending to substantiate that theory, and it is not unreasonable or stamped with improbability. He is entitled to have given charges correctly stating the law of his case, if the are supported by an evidence, however weak, insufficient or inconsistent, or of doubtful credibility it may be." (Tandum v. United States, 190 F.2d 612,617 [D.C. Cir J951]).

Additionally, there is a substantial body of law in New York concerning the standards to be applied when evaluating evidence of the justification defense.

The New York Court of Appeals has

recently stated that,

"The introductory provision to article 35 of the Penal Law evinces an intent to give the justification defense the broadest possible scope. It states without qualification that the defense is available "in any prosecution for an offense"...Accordingly, this court has rejected a restrictive application of the defense...(People v. McManus, 67 NY2d 541,at 547 [9186]).

Our courts have also held that in determining whether a defendant has presented sufficient evidence for an instruction on the defense of justification, the evidence must be viewed in the light most favorable to the accused (People v. Padgett, 60 NY2d 142, [1983]); People v. Ruiz, 96 A.D. 2d 845 (2d Dept. 1983]).

It is the duty of the judge, at least on request, to instruct on the law of justification whenever there is "some evidence" in the case (People v. Tone, 42 NY2d 1036, supra; People v. Hernandez, 67 AD2d 988 (2d Dept, 1979]).

In light of the strong constitutional considerations in favor of allowing

defendants to have their defenses submitted to the trier of fact, the discrepancy between the low standard of production which some courts have articulated in theory (U.S. v. Basily, 444 U.S. 394 [1980] [must meet "minimum standard"]; People v. Hubbard, 115 Mich. App. 73 [1982] [must produce "some evidence"]), and the extraordinary high standard ultimately imposed in many instance on civil disobedient who raise the necessity defense seems inappropriate.

The Reasonable Belief Standard

In People v. Goetz (68 NY2d 96 [1986], the New York Court of Appeals emphasized that the justification statute requires a determination of reasonableness that is both subjective and objective. The critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendants's background and experiences would conclude (see 1 CJI, N.Y.P.L. 35.00, Introductory Comment at 848-849).

The same basic standards should apply

in cased where defendants assert the justification defense defined by Penal Law 35.05(2).

Because the purpose of the necessity defense is to promote socially desirable results, it must evaluate the quality and wisdom of the defendant's voluntary choice. An inquiry limited to a defendant's subjective belief failed to make such an evaluation. The theoretical base of the justification defense is that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property. The benefit is lost, however, and the theory fails when the person does not act reasonably (United States v. Simpson, 460 F2d 515 (9th Cir [1972]). It is for this reason that defendants reasoning a justification defense are held to a reasonable belief standard.

There is only one element of the necessity defense to which a standard more stringent than reasonable belief must be applied - that is the actor's choice of values, for which he is strictly liable.

An actor is not justified, for

example in taking human life to save imperiled property. No matter how real the threat to property is, by making the wrong choice in placing the value of property over human life, the actor loses the defense. Thus, the choice of values requirement ensures that the defense cannot be used to challenge shared societal values.

To apply a strict liability standard in evaluating the other elements of this defense, however, and to find that only those actors who have actually averted a greater harm may avail themselves of the defense, is in consistent with the law of justification in New York, as well as the necessity's basic purpose to promote societal interests. (Note: Applying the Necessity Defense to Civil Disobedience Cases, 64 NYU L. Rev. 79 [1989]). Applying the above standards, the Court will now analyze the elements of the necessity defense as they apply to defendants' actions in this case.

The Choice of Evils Requirement

As stated earlier, defendants' value

choice is the one are where they must be held strictly liable. a judge must decide whether the actor's values are so antithetical to shared social values as to bar the defense as a matter of law.

As part of this objective inquiry, the requirement that a judge also determine whether or not the defendant's value choice has been preempted by the legislature has sometimes been read into the statute. New York specifically declined to adopt the broad provision of the Model Penal Code section dealing with legislative pre-emption in necessity cases. (See Model Penal Code 3.02© "a legislative purpose to exclude the justification claimed does not otherwise plainly appear") and instead provided that defendants must not be protesting only against the morality and advisability of the statute under which they are charged.

a reading of the cases in this area reveals that it is seldom the correctness of defendants' values which is at issue. Courts have generally recognized that the harms perceived by activists protesting nuclear weapons and power and United States domestic and foreign policy -

nuclear holocaust, international law violations, torture, murder, the unnecessary deaths of U.S. citizens as a result of environmental hazards and disease - are far greater than those created by a trespass or disorderly conduct (People v. Chachere, 104 Misc. Id 521 [1980]; People v. Scutari et al NY LJ, October 2, 1990, at 27, col 5; People v. Alderson, 144 Misc Id 133 [1989]).

In this case, the defendants are all embers of an organization called Transportation Alternatives, an organization devoted to the promotion of non-vehicular, ecologically sound means of transportation. Through their testimony and that of their expert witnesses, it was clear that these defendants' actions were motivated by the desire to prevent what they called the "asphyxiation of New York" by automobile related pollution. Specifically, the harm they seek to combat is the release of ever higher levels of pollution from vehicular traffic, and the unnecessary death and serious illness of many New Yorkers as a result.

Defendants also articulated a motivation to put an end to an extremely

hazardous situation that had resulted on the Queensboro Bridge south outer roadway, subsequent to the implementation if the regulation opening that roadway to vehicular traffic during the evening rush hour. Since many pedestrians and bicyclists continued to use that roadway, the defendants testimony that they also acted to prevent serious injuries to those individuals who continued to use alternative forms of transportation on the bridge.

Certainly, neither of these harms could be said to have developed through any fault of these defendants. Nor is there an issue of legislative preemption in this case.

In fact, in a departure from he usual situation in citizen intervention cases, it is clear that it is the defendants' point of view concerning air pollution and its accompanying dangers that has been confirmed and adopted by the legislature.

As testified to by the former Commissioner of Transportation, Ross Sandler, the Clean Air Act of 1970 required the Environmental Protection Agency (EPA) to promulgate "clean air"

standards. New York is not now, and has never been in compliance with those minimum standards set by the EPA. This non-compliance has been the cause of numerous citizen suits seeking enforcement of pollution level standards in New York City (National Resources Defense Council,Inc. v. U.S. Environmental Protection Agency, 494 F2d 519 (2d Cir. 1974); Friends of the Earth v. Carey, 422 F. Supp. 638 (S.D.N.Y. 1976), vacated 552 F2d 25, on remand 76 F.R.D. 33 application denied; Beame v. Friends of the Earth, 434 U.S. 1310 [1977]).

Broad legislative preferences such as that expressed by the Clean Air Act have often been used in the reverse situation by the Courts to ban the necessity defense on grounds of legislative preemption. This is particularly true in a number of cases where courts have implied a legislative choice in favor of nuclear power and weaponry (United States v. Best, 476 F. Supp. 34.41 [D. Colo:1979); People v. Hubbard. 115 Mich. App. 73, (1982); State v. Warshow, 138 VL 22.410 A2d 1000 [1979]; New York v. Eisenberg [Staten Island Cir. Ct. N.Y. App. Term #7R005336

et seq. 1988); People v. Chachere 104 Misc. Id 521 [1980]).

In this case, however, as pointed out above, the values motivating these defendants are clearly in line with the legislative purposes expressed in this area by the United States Congress.

Certainly, the regulation by the Department of Transportation concerning the Queensboro Bridge cannot be cited as legislative preemption in this case. First, the doctrine simply does not apply to execution or agency action. Moreover, the circumstances under which this regulation was passed preclude any argument that a full discussion and resolution of the competing values at stake was undertaken by the Department of Transportation (see infra, page 33).

Each of those cases, (such as the nuclear power protests) where there has been some legislation in a particular area, many courts do not consider the mere existence of such legislation to be sufficient evidence that the legislature has weighed the competing harms and made a preemptive value choice. Instead, they read the "clearly articulated value"

element more literally, requiring legislature to have specifically weighed competing harms, including those foreseen by defendants, and made a value choice which rejects the defendant's position (see People v. Jones nos. 83-101226 to 83-101228, slip op. at 4 [Mich DisL Ct. March 2, 1984 at 3-4]; see also Model Penal Code 3.02 commentary a 13 [1985] [legislative choice clearly articulated where "the legislature has itself canvassed the issue and determined what the choice of evils should be").

It is clear from the legislative commentary and all the ensuing litigation that such a canvassing and conscious choice was made by Congress in the passage of the Clean Air Act while no comparable process was undertaken by the Department of Transportation before issuing the regulation that gave rise to this case.

Nor is this case where the defendants are acting against what the courts have already recognized as a fundamental right, as in the abortion protests which have asserted a necessity defense. There is no corresponding fundamental right to contribute to life threatening air

pollution. (People v. Crowley, 142 Misc. 2d 663 (Justice Ct. Town of Greece 1989); People v. Archer, 143 Misc, Id 390 (City Ct. Rochester 1988). In Archer, the Court submitted the necessity if they found second trimester abortions were being performed. The Court failed to recognize the constitution protection extended to such procedures under Roe v. Wade 410 U.S. 113 [1973]). Defendants in that case were convicted.

In this case as well as in most necessity cases, it is clear that defendants chose the correct societal value. It is beyond question that both the death and illness of New Yorkers as a result of additional air pollution, and the danger of cyclists and pedestrians posed by vehicles on the south outer roadway, are far greater harms than that created by the violation of disorderly conduct.

The more difficult issue in many of the necessity defense cases has been whether the actors' perception of harm was reasonable. The Court will now turn to a discussion of this requirement, and the additional requirement of New York Penal

Law Section 35.05 that the harm be imminent.

Imminence of Grave Harm Requirement

In evaluating whether defendants's perceptions of the harm they sought to avoid in this case were reasonable, the Court must decide whether they have "a well founded belief in imminent grave injury". (United States v. Ashton, 24 F. Gas. 873 [C.C. Mass. 1834] [No. 14,470]; accord United States v. Cassidy, 616 F 2d 101.102,[4th Cir. 1979]; State v. Heyer, Nos. 83-101221 to 83-101225, slip op. at 3 [Mich DisL CL April 1984] [order permitting necessity defense]).

a determination of whether defendants reasonably believed that a grave harm was imminent is almost always a question for the trier of fact (State v. Heyer, (Dist. CL. Oakland Co. 52nd DisL. 1st Div. Nos. 83-101194-101228, 1985); People v. Jones, Nos. 83-101226 to 83-101228, slip op. at 4-5 Mich. DisL CL Mar. 2, 1984) (opinion and ruling denying prosecutor's motion to exclude defense of duress). In the words of one court, "In all but the clearest of

cases", imminence is a question for the trier of fact, State v. Harmon, 53 Mich. App. 492-486,(1974) (prison escape case) aff'd, 394 Mich. 625 (1975).

The courts have found that testimony in cases involving anti nuclear protests has established a jury question as to whether an emergency existed. (State v. Mouer, No. 77-246 through 77-324 (Columbia Co. Dist. CL. Dec. 12-16, 1977] [acquitted by jury]; People v. Block, et. al (Gault Judicial Dist., Sacramento Co. Muni,Ct. Cal., Aug. 14, 1979]).

In People v. Block, the court allowed the necessity defense after defendants argued that since the Three Mile Island nuclear power plant accident, they could be "legitimately concerned about life threatening situations and feeling that the authorities....were not doing their job". (Defendants' Memorandum of Points and Authorities in Support of Their Right to Present Evidence as to the Defense of Necessity to the Charges Against Them at 18).

In another case, People v. Ilagrou, Nos. 85-000098 to 85-000100, 85-000102, slip op. (Mich. DisL Cz MAr. 22, 1985),

the court judicially noticed that there is a high risk of nuclear accident and found it not unreasonable that defendants had a fear of death.

Defendants in the instant case presented several witnesses, as well as submitting studies, to establish the existence of a grave and imminent harm. Defendants themselves testified that the DOT regulation, if obeyed, would prove to be a devastating disincentive to New Yorkers who use alternative or non-vehicular means of transportation between boroughs of Manhattan and Queens. The only road open to bicyclists and pedestrians is practically inaccessible to them during the hours most critical to their return home. In contrast to this disincentive to non-polluting forms of transportation, another lane is open to vehicular traffic.

Defendants clearly articulated their belief that encouraging automobiles at a rush hour traffic "choke-point" while discouraging walkers and cyclists produces a specific grave harm that is not only imminent, but is occurring daily. This belief was supported by the testimony of

expert witnesses and studies submitted into evidence.

Former Commissioner of Transportation Sandler gave undisputed testimony that New York City would have to reduce vehicular traffic in order to come into compliance with the minimum standards set by the Environmental Protection Agency.

Although there is a greater deal of controversy as to whether EPA standards are in fact strict enough by its passage Congress clearly acknowledged that violations of those standards are seriously harmful to public health and safety. a central purpose of the Clean Air Act, 42 U.S.C. sections 7401-7642 (1982) enacted by Congress in 1970 and amended in 1977 is "to protect and enhance the quality of the Nations's air resources so as to promote the public health and welfare and the productive capacity of its population" 42 U.S.C. 7408(b)(1).

Under the framework of the Act, the Administrator of the U.S. Environmental Protection Agency must promulgate an air quality standard for an air pollution that may reasonably be anticipated to endanger public health. (42 U.S.C. section

7408(a)(1)(a), 7409(b)(1)). Each state must then adopt and submit to EPA a plan for implementation, maintenance and enforcement of the air quality standard for each pollutant (See 42 U.S.C.section 7410(a)).

Although the Clean Air Act's original goal was to achieve substantial attainment of the air quality standards by 1977, New York has never achieved compliance. It has been held, that ones a state plan is adopted by a state and approved by the EPA, it becomes controlling and must be carried out by the State, with modifications permitted "only cautiously and grudgingly." (Friends of the Earth v. Carey, 535 F 2d 165,169 (Id Cir. 1976).

By submitting plans for compliance, however, New York has been able to obtain successive extensions from Congress. Literally hundreds of cases have been brought by citizens's groups in this area. In recognition of the vital role to be played by citizen advocates, and acknowledging that compliance with minimum air quality standards in New York remains seemingly unattainable, the courts have said stated that:

"Congress made it clear that citizen groups are not to be treated as nuisances to

troublemakers, but rather as welcomed participants in the vindication of environmental interests" (Friends of the Earth v. Carey, supra, at 172).

Recent litigation coooborates defendants claim that New York's failure to comply with EPA standards is due, in substantial mausre, to automobile related pollution. (N.R.D.G. v. N.Y. State Dept. of Environmental Conservation, 668 F.Supp 848 [S.D.N.Y. 1987]).

In ordering compliance with the state's own air quality implementation plan once again, the court stated that:

"While enforcement of the air quality plan might well cause inconvenience and expense to both governmental and private parties, Congress has decreed that whatever time and money other might be saves should not be gained at the expense of the lungs and health of the community's citizens." (N.R.D.C. v. N.Y. State Dept. of Environmental Conservation, supra at 854, citing Friends of the Earth v. Carey, supra at 179).

The concrete harm being caused by continued excessive air pollution is well documented and widely accepted. Defendants' witnesses and exhibits, coupled with a review of the facts cited by courts in recent cases provide dramatic evidence on this point Dr. Steven Markowitz of the Mount Sanai Department of Environmental ad Occupational Diseases testified that air pollution in New York and elsewhere is a major cause of lung, respitory tract and heart disease. He particularly singled out carbon monoxide and nitrogen oxide as disease causing agents.

The EPA reported in 1989 that the lifetime exceed cancer risk from exposure to the toxic chemicals in the urban atmosphere ranged from 1 in 10,000 to 1 in 1,000. To demonstrate the seriousness of these statistics, EPA has often used a risk level of 1 in 1 million as a guidepost for triggering regulatory action. The agency has also estimated that thousands of deaths are caused each year by public exposure to a selected number of air toxics.

Every year in New York City

automobiles, trucks and buses send hundreds of thousands of pollution directly into city air. No other pollution source even approaches this level.

EPA's 1989 assessment concluded that motor vehicles were the single largest contributor to cancer risks from exposure to air toxics. Motor vehicles, said the EPA are responsible for 55 percent of the total cancer incidence from air contaminants, five times greater than from any other air pollution source.

In the EPA survey, motor vehicles particulates accounted for more than 76 percent of the benzene, 63 percent of the directly emitted formaldehyde, and 77 percent of all polycyclic organic matter found in urban air. In addition, the average automobile (traveling 10,000) emits about 650 pounds of carbon monoxide, 105 pounds of hydrocarbons, 50 pounds of nitrogen oxides, and 12 pounds of particulates into the air each year.

a single gas tank of gasoline produces about 300 to 400 pounds of CO2 when burned. According to state data the peak eight-hour concentration in 1988

recorded at 59th street between Third Avenue and Lexington - the approach to the Queensboro Bridge was 13.9 parts per million, far exceeding the national standard (American Lung Assoc. of N.Y.S. et aL v. N.Y.S. Dept. of Env. 668 F. Supp. 848 (S.D.N.Y. 1987); N.R.D. Gv. Train 411 F. Supp. 864 (S.D.N.Y. 1976); Natural Res. Def. Coun. Inc. v. U.S. Friends of the Earth v. Carey, 535 F. Id.,165 (Id Cir. 1976); Defense Exhibit G, a New York City Department of Transportation study, entitled "Improving Manhattan Traffic Air Quality Conditions - Effectiveness of Bicycle Programs (1990)").

The above cited DOT study also acknowledges that bicycle riding has a significant and untapped potential to reduce traffic congestion and its accompanying air pollution. It indicates that the numbers of people who would adopt this form of transportation if encouraged by simple safety measures including bicycle lanes on the part of New York City (almost 30 percent of those surveyed) is impressive. It states that the current level of bicycle ridership in New York City is indicative only on those

individuals who are so dedicated to cycling that they are willing to utilize a transportation system that has been shared for decades without provisions for bicycles.

Defendants Komanoff pointed out that the overall figure of 30 percent cited by the survey did not accurately reflect the potential for cycling as an alternative to polluting forms of transportation since 70 percent of the respondents lived over 10 miles from their workplace. Among those who lived within 10 miles of their workplace, 49 percent replied that they would ride bicycles to work if some provisions were made for their safety and comfort.

Dr. Markowitz testified that every increment in pollution makes a difference in terms of its negative impact on public health. He testified that the inverse is also true, i.e. every decrease in New York air pollution has a corresponding positive effect.

Defendants pointed out in their testimony that the need for repairs on the Queensboro Bridge provided a perfect opportunity to encourage walking and

cycling as alternative forms of transportation, as well as a disincentive for automobile traffic. In fact, the demonstrations held by these defendants on a weekly basis prior to the date of arrest in this case provided dramatic examples of the increased numbers of people who would use alternative forms of transportation if their safety was insured.

Instead, as the situation now exists, an additional lane open to vehicular traffic, with each additional car causing the types and amounts of pollution described above, and a tremendous disincentive has been imposed upon those who use alternative forms of transportation.

Defendants repeatedly expressed their belief that those who use bicycles or who walk are now placed in the following dilemma: they can obey the ordinance and use forms of transportation which further contribute to pollution, or they can disobey and be subject to the extremely hazardous conditions caused by riding with the traffic on the south outer roadway.

Unlike many of the cases in this area, where the harm sought to be

prevented was perceived as too far in the future to be found "imminent", the grave harm in this case is occurring every day. The additional pollution breathed by all New Yorkers (in a city that is already out of compliance with the minimal standards set by the EPA), as a result of the fact that more road space will be devoted to vehicles and its corollary that those hundreds of individuals who would otherwise bicycle or walk are discouraged from using non-polluting forms of transportation is a concrete harm being suffered by the population at this moment.

The dangerous situation of cyclists and pedestrians travelling at the same hours as vehicular traffic is also a daily occurrence witnessed by several of these defendants. Defendants and their witnesses testified to their observations and documentation of the fact that many cyclists and pedestrians continue to use the south outer roadway, despite the DOT regulation. While the presence of cyclists and pedestrians on the day of the demonstration may be said to have presented a danger of the defendants' own making on all the other occasions

testified to, many individuals using alternative forms of transportation were present on the bridge at no instigation from these defendants. It is undisputed that the resulting mixture of automobiles, bicycles and pedestrians represents an extremely dangerous situation with the potential for tragic consequences.

Defendants' witnesses also testified that due to the opening of the south outer roadway to vehicles during the rush hour, vehicles often assume it is open to them at other times as well. Their entry onto this roadway during non-rush hours also creates a serious hazard for walkers and cyclists.

These facts clearly distinguish the instant case from this situations where the courts have found the harm in questions to be too remote (see People v. Chachere, 104 Misc. 2d 521 (1980); People v. O'Grady, 147 Misc. 2d 118 (1990); appeal denied, 76 NY2d 942 (1990); People v. Alderson, 144 Misc. 2d 133 (1989)).

In light of all the evidence of grave and imminent harm cited by these defendants, the Court finds that it would be improper to hold as a matter of law

that they has not met their burden of production on this element of the defense, i.e. that no reasonable juror could find that defendants had a reasonable belief that grave and imminent harm was occurring.

The Inquity therefore becomes whether the People have disproved this element beyond a reasonable doubt.

The prosecution contends that no evidence was shown that barring bicycles and pedestrians from the south outer roadway of the Queensboro Bridge would cause increased pollution. It is argued that this roadway will only be closed "temporarily" during repairs and that opening a former bicycle and walking lane will decrease traffic congestion, thereby lessening pollution. The People also argue that no decrease in alternative forms of transportation need occur, since there is a van which is provided to shuttle cyclists periodically across the bridge during rush hours.

In response defendants testified that their consultations with the Department of Transportation revealed an intention to keep the bicycle and pedestrian lane

closed during the evening rush hour for period of six or seven years if repairs are made on schedule. This can hardly be viewed as a temporary measure.

Furthermore, former Commissioner of Transportation Sandler testified that the net effect of giving vehicles more space to travel, which has been the constant trend over the last fifty years in New York, has not resulted in an increase in average automobile speed which would decrease pollution, but rather in more cars going at a decreased rate of speed.

In addition, defendants testified that the van proposed as an alternative for walking and cycling is, in itself, a great disincentive to non-polluting forms of travel. First of all, forcing people who cycle and/or walk because of their deep commitment to ecologically sound means of transportation to use a pollution causing vehicle every day directly negates their incentive to walk or cycle one way.

As people who are thoroughly familiar with the area of alternative means of transportation and those who use them in New York, defendants testified that in this opinion, significant numbers of

people have already been discouraged from walking and cycling. In addition to their daily contacts and communication with cyclists and walkers, defendants cited the hundreds of people who joined them on their demonstrations, and who expressed their enthusiasm for alternative transportation when it was made safe enough, but refrain from walking or cycling at other times.

Additionally, several witnesses testified that the designated waiting area for the van is isolated and dark, making them fearful for their safety. The waiting time can be up to 40 minutes, and the scheduling is irregular. Furthermore, defendants documented by their own courts on the bridge that were all cyclists to use the van, the waiting time would stretch into hours. All witnesses familiar with the van testified that they had heard drivers tell pedestrians that the van was not available to them and saw pedestrians actually being barred from the vans on many occasions. No alternative whatsoever is provided for people who wish to walk to and from work.

This Court also rejects the

contention that proof of the imminent death of New Yorkers as a result of high levels of air pollution or accidents on the south outer roadway is required before the finding of an emergency can be made to uphold this defense. The medical evidence connecting air pollution and disease - namely cancer and heart disease - is too well established for such a position to be logical. Nor should cyclists or walkers be at the point of being struck by a vehicle before a hazardous situation can be recognized.

Most courts used the imminence requirement to determine whether the alleged danger was of the type of demand the defendants actions (United States v. Seward, 687 F2d 1270, 1276 (10th Cir. 1982) (necessity defense not triggered where protestor not confronted with direct harm), cert. denied, 459 U.S. 1147 (1983); United States v. Lowe, 654 F2d 562, 566-67 (9th Cir, 1981) (same); United States v. May, 622 F2d, 1000, 1009 (9th Cir) (same); cert denied, 449 U.S. 984 (1980) State v. Warshow, 138 Vt. 22,24 410 A2d 10 nuclear build-up not of sufficient immediacy to permit use of necessity defense)).

To require that the ultimate result of the harm acted against be already occurring would place the actor in a catch-22 situation; the longer the actor waits in order to satisfy the immediacy requirement, the less likely his action reasonably can be expected to effectively avert the harm, thus failing to satisfy another element of the defense.

In recent cases, it has become evident that the lesser evil sometimes must occur well in advance of the greater harm. In People v. Harmon, 53 Mich. App. 482, 220 N.W. 2d 212 (1974), the defendants escaped from prison one evening after threat of assault, although there was no present of impending assault. The court ruled the "imminency is to be decided by the trier of fact taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm" (People v. Harmon, supra, at 214).

One group of defendants recently argues that the imminence requirements should be defined as follows: "the feared harm is expected to happen as soon that

preventive action must being at once in order to be effective, and the harm is expected to occur far enough in the future that there is still time to stop it by immediate and ensuing actions." (Defendants' Brief Supporting Defense of Necessity and International Law at 29, United States v. Douglass, nos. 83-03M-01 to 83-03M-03 (W.D. Wash. 1983) aff'd unreported (9th Cir. Nov. 27, 1985)).

In this case, the threatened harm of increased deaths and illness through air pollution is a uniquely modern horror, very different from the fires, floods and famines which triggered necessity situations in simpler days. However, the potential injury is just as great, if not greater.

This Court is painfully aware that once individuals succumb to the diseases listed by Dr. Markowitz - chronic lung disease, cancer of the lung, and hear disease - the time for any action to prevent the environmental causes of these illnesses is long past due. In part, to our failure to recognize high air pollution levels as an emergency despite its well documented connection to many of

our fatal and incurable illnesses, individuals are then case into a frantic and lonely search for extremely costly and difficult therapies whose effectiveness is acknowledged as limited in a majority of cases.

Defendant Komanoff, who as an energy consultant has given expert testimony before municipal and state agencies in twenty states, four United States congressional committees, the Nuclear Regulatory Commission, state and public utility corporations and the Select Committee on Energy of the House of Commons in the United Kingdom, as well as serving as a consultant to Fortune 500 companies and the United States Congress on energy related matters, and publishing Op Ed Articles in newspapers throughout this country, expressed his opinion that the reasons the current state of health-impairing pollution is not publicly recognized as an emergency are rooted in societal "automobile dependency."

Mr. Komanoff stated that 60 percent of petroleum needs in the United States are generated by the demands of automobiles. He cited the fact that the

United States is the biggest world importer of petroleum and testified to his opinion that automobiles dependence was responsible for what he called the "distortion of U.S. economic and foreign policy."

Whether one agrees with Mr. Komanoff's statements or not, it is clear that they do offer one explanation for the lack of a more widespread recognition that an emergency exists, despite the clear evidence of life threatening damage caused by air pollution.

Pursuant to the foregoing discussion, this Court finds the prosecution has failed to disprove the element that defendants in this case has a reasonable belief in a grave and imminent harm constituting an emergency, beyond a reasonable doubt.

The No Legal Alternative Requirement

A key requirement of the necessity defense is that no reasonable legal option exist for averting the harm. Once again, the proper inquiry here is whether the defendant reasonably believed that there

was not legal alternative to his actions. The defense does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal actions in order to provide an essential safety valve to law enforcement in a democratic society.

The Ninth Circuit in United States v. Contento-Pachon, 723 F2d 691)9th Cir. 1984) affirmed that the necessity defense was available to a defendant who acts to promote the general welfare, and in United States v. Dorrell, 758 F2d 427 (9th Cir. 1985), stated that the necessity defense recognizes that in certain circumstances, the choice that society would also have made, and is now given a chance to rarity.

It has been asserted that because a democracy creates legal avenues of protest, alternatives must always exist. In the opinion of this Court, however, to dispense with the necessity defense by assuming that people always have access to effective legal means of protest circumvents the purpose of the defense.

When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives,

they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity.

In all of the cases cited as acquittals in this opinion, judges have found that civil disobedients were able to raise a question of fact as to whether legal alternatives existed.

Defendants in this case testified to a long history of attempts to prevent the harm they perceived. Although Transportation Alternatives is a group that is regularly consulted by the Department of Transportation and meets often with agency officials to propose measures to encourage walking, cycling and the use of mass transit, and to relieve traffic congestion with its accompanying pollution, they received no advance warning that the closing of the bicycle nd pedestrian lane on the Queensboro Bridge

was being considered.

Upon learning of this decision, the executive director of Transportation contacted officials in the Department of Transportation and learned that no written notice, had been made to any public interest group, nor were any hearings held before this regulation was passed.

Transportation Alternatives also mailed a newsletter to its 12,000 members urging them to write and (or call the elected official involved. The six defendants on trial were personally responsible for hundreds of letters and phone calls to Department of Transportation officials and elected officials. They testified that these same efforts were made by hundreds of other Transportation Alternatives members.

These defendants also participated in Transportation Alternatives' concerted petitioning and leafletting campaign, beginning on the first day of the bridge closing. The goal of all of the efforts by members of Transportation Alternatives was to obtain the DOT's consent to a trial period of leaving the south outer roadway open to pedestrians and cyclists and

monitoring the resulting traffic conditions. The arguments put forward in their letters, petitions and calls included pointing out that this was a perfect opportunity to observe the results of a disincentive for vehicular travel, instead of penalizing those who utilized ecologically sound means of transportation.

Transportation Alternatives took the position that if they could obtain a public hearing on the issue of why the south outer roadway should not be closed to walkers and cyclists. When no movements whatsoever resulted on the issue of a public hearing, weekly demonstrations were held which involved walking and cycling across the south outer roadway. At all times Transportation Alternatives made it known that these demonstrations would cease if a public hearing was held.

Certainly, the efforts testified to by these defendants distinguish them from other cases in New York where the necessity defense has been found inapplicable (People v. Anderson, 144 Misc. 2d 133 (1989).

Although there is no clear rule as to

what facts are required to support a defendant's burden to present evidence so that a trier of fact could find that he reasonably believed no alternative existed, some recent cases seem to indicate the appropriate level of inquiry.

In State v. Keller, No. 1372-4-84 (Vt.Dist. Ct. Nov, 17, 1984) the defendants successfully asserted that they conducted a site-in at Senator Stafford's office after "attempting in every reasonable manner to communicate with him."

In People v. Legrou, Nos. 85-000098 to 85000100, slip op. (Mich. Dist. Ct. March 22, 1985), the court was convinced by the defendants' arguments that methods other than trespass were ineffective. "There are some who say that there is absolutely no prosect of the administration or the Congress to bring this matters to a successful conclusion and that the track record proves it and that the only possibility, however remote, the only possibility of survival lies in protest. If people believe that, who can say they are wrong?" (Transcript of Judge's Order, People v. Lagrou, supra, at

10-11).

In People v. Block, Crim. Nos. 3235-3245 [Cal. Sacramento County Mun, Ct. August 1979] defendants offer of proof of a long history of activism convinced the judge to instruct on the necessity defense, and the jury to acquit based upon those instructions. Similarly, in People v. Lemnitzer, No. 27106E (Pleasanton-Livermore Judicial District, Alameda Co.,Muni. Ct. 1982) People v. Aldridge, supra; People v. Jarka, supra; Chicago v. Streeter, supra; United States v. LaForge and Katt, No. CR 4-84-66 (U.S. Dist. Ct. Minn. Nov. 8, 1984); and People v. Boelcke, No. 101194-101203 (52nd Jud. Dist. Jan 7-12, 1985), defendants won instructions on the necessity defense after testifying to their history of attempting to affect change through legal means.

Consistent with the level of inquiry in these cases, the court in United States v. Gant, 691 F2d 1159 (5th Cir. 1982) stated that a history of futile attempt by others will meet the no-legal alternative requirement, but that a single instances of delayed police response did not

necessitate the defendants taking the law into his own hands. The defendants in this case were certainly aware of the long history of litigation by citizens groups in efforts to enforce compliance with the Clean Air Act in New York.

In this case, the defendants were individuals who were thoroughly familiar with the process by which decisions concerning transforation in New York are made, and who, despite their long history of an advocacy and consultative role in such matters, were completely excluded from the decision making process concerning the closing of a very important roadway for non-polluting forms of transportation. Where, at the first opportunity every traditional method of petitioning, letter writing, phone calling, leafletting and lobbying was vigorously pursued by these defendants to no avail, it cannot be said as a matter of law that they did not reasonably believe their legal alternatives to be exhausted.

The prosecution cross examined, the defendants concerning their failure to carry out an advertising campaign, a tactic they admitted was beyond their

economic means.

There is no reason why the courts should be blind to the social reality that confronts them, and continue to treat American democracy as if it were still peopled by simple individuals with equal financial and political power. In other words, of Supreme Court Justice Douglas:

"Those who do not control television and radio, those who cannot afford to advertise or circulate elaborate pamphlets may have only a limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable." (Adderly v. State of Florida, 385 U.S. 39, 50-51 (1966) (Douglas J. dissenting).

Defendants were also cross-examined as to why they did not demonstrate in a location other than the Queensboro Bridge.

In light of the fact that the demonstrations preceding October 22, 1990 did not include demonstrators refusing to move, and the goal of preventing the harm reasonably perceived by these defendants had not yet been achieved, the de-escalation in tactics suggested by the

prosecution would certainly not have appeared to be an alternative with any reasonable likelihood of efficacy.

Additionally, it has been held that the more imminent the peril, the less likely the existence of an alternative course of action (People v. Pena, 149 Cal. App. 3d Supp. 14, (1983)). As outlined earlier, in this case the harm perceived by these defendants was already occurring on a daily basis. "Therefore, in the opinion of this Court, the People have not disproven this element of the necessity defense, requiring defendants to have a reasonable belief that no further legal alternatives were available to them, beyond a reasonable doubt.

The Causal Relationship Requirement

New York is among the jurisdictions that require a defendants actions to be "reasonably designed to actually prevent the threatened greater harm" (People v. Charchere, 104 Misc. 521, supra, People v. Anderson, 144 Misc. 2d 1146 supra; People v. scutari, NYU October 2, 1990, at 27 col 5; People v. Grady (147 Misc. 2d 118,

supra)).

The reasoning which supports this requirement was expressed in United States v. Gant, 691 F2d 1159 (5th Cir. 1982) "If the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct." (United States v. Gant, supra at 1164).

One of the cases most often cited for the proposition that there must be a causal relationship is United States v. Simpson, 460 F2d 515 (9th Cir. 1972) which involved the setting of a fire in a selective service center. While this court in Simpson used the causal element to condemn particular tactics - setting a fire and destroying property - subsequent cases have used it to condemn civil disobedience across the board by imposing rigid and formalist requirements of time and space upon the actors.

An inflexible test allowing for not injury into the circumstance and events surrounding the formulation of a defendant's belief, while imposing an after-the-fact requirement of an immediate relationship, constitutes a rule of per se unreasonableness, whereby a defendant who

fails is held as a matter of law not to have reasonably believed in the efficacy of his action.

As with the other elements of this defense, the test consistent with the purposes of this defense is one of reasonable belief. Defendant's initial burden is to offer sufficient evidence of a reasonable belief between their behavior an ending the perceived harm.

The People argue that defendants could not have reasonably believed that this actions on October 22, 1990 would being about a halt to the harms they perceived.

The New York statute and most common law formations use the term "necessary" rather than "sufficient". In the opinion of this Court, a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success.

Consider the case of a person who see a dam about to overflow and destroy a neighboring house. The employee's responsible for raising the dam is asleep in his office with the door locked. The person rushes to the office, and, in spite

of a "no trespass" sign, breaks the lock, pushes the guard aside and raises the dam, knowing that his action will probably prevent only some of the damage to the house, and perhaps none of it. All that he can hope to do is alleviate the harm, rather than completely eliminate it. IT is still desirable for him to take such action, however, and his actions should be considered justifiably necessary. (Note: The Necessity Defense and Social Change, 33 Wayne L. Rev. 1221 (1987)).

The better view of this requirement was set forth in Commonwealth v. Berrigan, 325 Pa Super, 242, 472, A2d 1099 (1984), rev'd, 509 Pa. 118, 501 A2d 226 (1985) in the majority and concurring opinions:

"The dissent seems to say that to avail themselves of the defense appellants must be able to show that their actions could totally avert nuclear war; we will not hold them to such burden. Appellents must show that their actions could reasonably have been thought necessary to avert a public disaster.

The allacy in the trial courts and the dissent a reasoning is to equate "reasonableness: with success. If by

breaking the law you did not succeed in gaining your objective, you may not plead justification. But reasonableness is a function of the actor's situation. If the peril to the town was slight, it may indeed have been reasonable of me to make a firebreak by destroying my neighbors house. But if the peril was great, my action may be seen in a very difficult light, and my plea of justificator, amy prevail, even in the face of proof that the fire swept across the space I had cleared, and burned down the town....(Commonwealth v. Berrigan, supra, at 1107, 1115).

In several cases defendants have successfully met the minimum standards of production in this area through reference to the historical effectiveness of such tactics (People v. Block, Crim, Nos. 3235 to 3245 (Cal. Sacramento County Mun. Ct. filed Dec. 13, 1979)).

While this Court agrees that there are numerous examples in the United States historically which support the reasonable belief of a causal connection between citizen intervention and the prevention of harm - from the Boston Tea Party,

noncooperation with the Stamp Act, and other civil disobedience tactics used in the early stages of the American Revolution, which were so effective that some scholars contend that with a little patience, the actual war could have been avoided; to the underground railroad organized to take slaves to freedom; the vigils and hunger strikes of the womens' suffrage movement; the labor sit-down strikes of the 1930's and the Civil Rights campaign of the 1940's through the 1960's - the defendants in this case need not go beyond their own experiences.

Defendants testified that they had participated in two short term campaigns in the recent past which only became successful when civil disobedience was employed. One of these campaigns resulted in the defeat of Mayor Koch's attempt in 1987 to ban bicycles from Manhattan streets. The second involved their attempts during the 1980's to obtain access to a roadway along the river in New Jersey for cyclists and walkers. All efforts at letter writing and petitioning had been rebuffed, and it was only after members of Transportation Alternatives for

their insistence and made the lane permanent.

In each of these cites examples, members of Transportation Alternatives participated in civil disobedience/citizen intervention which proved to be the last step needed to avert the harms acted against.

Each defendant testified that they believed their actions on October 22, 1990 would have a direct effect in avoiding the perceived harms in this case. In light of their past experiences, that belief cannot held unreasonable as a matter of law.

Neither through cross-examination nor independent evidence did the People disprove a reasonable belief by these defendants that their actions on October 22, 1990 were necessary or that those actions were in fact the last effort needed to halt those harms. Penalizing them because a result reasonably expected did not actually occur immediately following their action, would be contrary to the purposes of the necessity defense.

Pursuant to the foregoing opinion, this Court finds that the People have not disproved the elements of the necessity

defense in this case beyond a reasonable doubt. Defendants are therefore acquitted.

National Sanctity of Human Life Day, 1988

By the President of the United States of America

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in *Roe v. Wade*, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each person's fundamental right to

life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality -- that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in *Roe vs. Wade* rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout our land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do I do proclaim,

ordain, and declare that I will take care that the Constitution and laws of the United States are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgement of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land to gather on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

THE OATH OF HIPPOCRATES , Abortion and the Early Church

I swear by Apollo Physician, by Asclepias, by Health; by Panacea, and by all the gods and goddesses, making them my witnesses, that I will carry out according to my ability and judgement, this oath and this indenture...I will use treatment to help the sick according to my ability and judgement, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give to a woman a pessary to cause abortion.

THE CONSTITUTION OF THE UNITED STATES

Preamble.- We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common

defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

AMENDMENTS to the CONSTITUTION

Article V

Capital Crimes and Arrest Therefor.-No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article IX

Enumeration of Rights.-The enumeration in the Constitution of certain rights shall not be construed to deny or

disparage others retained by the people.

Article XIV (1st part)

Protection for all Citizens.- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

THE DECLARATION OF INDEPENDENCE

In Congress July 4, 1776

The Unanimous Declaration of the Thirteen United States of America

When in the course of human events, it becomes necessary for one people to

dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for

light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for

their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to

pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obviated; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance vita his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all

the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to

our constitution, and unacknowledged by our loss; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us in many cases of the benefits of Trial by jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our

Governments: For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging war against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation. He has constrained our fellow-Citizens taken captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule

of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus Marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must therefore, acquiesce in the necessity which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

WE, THEREFORE, THE REPRESENTATIVE of the UNITED STATES OF AMERICA, IN GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the authority of the good People of these Colonies, solemnly PUBLISH and DECLARE, That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, We mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

at least be of respectable weight if thrown into the scale of either of two contending parties. This would be more peculiarly the case in relation to operations in the West Indies. A few ships of the line, sent opportunely to the reinforcement of either side, would often be sufficient to decide the fate of a campaign, on the event of which interests of the greatest magnitude were suspended. Our position is, in this respect, a most commanding one. And if to this consideration we add that of the usefulness of supplies from this country, in the prosecution of military operations in the West Indies, it will readily be perceived that a situation so favorable would enable us to bargain with great advantage for commercial privileges. A price would be set not only upon our friendship, but upon our neutrality. By a steady adherence to the Union, we may hope, erelong, to become the arbiter of Europe in America, and to be able to incline the balance of European

competitions in this part of the world as our interest may dictate. But in the reverse of this eligible situation, we shall discover that the rivalships of the parts would make them checks upon each other, and would frustrate all the tempting advantages which nature has kindly placed within our reach. In a state so insignificant our commerce would be a prey to the wanton intermeddling of all nations at war with each other; who, having nothing to fear from us, would with little scruple or remorse supply their wants by depredations on our property as often as it fell in their way. The rights of neutrality will only be respected when they are defended by an adequate power. A nation, despicable by its weakness, forfeits even the privilege of being neutral.

Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth. This situation

If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.

Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard. The state of agriculture and the populousness of a country have been considered as nearly connected with each other. And, as a rule, for the purpose intended, numbers,

in the view of simplicity and certainty, are entitled to a preference. In every country it is a herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability. The expense of an accurate valuation is, in all situations, a formidable objection. In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large.

PUBLIUS

FURTHER CONSTITUTIONAL DEFECTS

From the New York Packet, Friday, December 14, 1787

The Federalist Papers
No. 22: Hamilton

To the People of the State of New York:
IN ADDITION to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number. The utility of such a power has been anticipated under the first head of our inquiries; and for this reason, as well as from the universal conviction entertained upon the subject, little need be added in this place. It is indeed evident, on the most superficial

genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders and invite them by our weakness to seize the naked

and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty by an abuse of the means necessary to its preservation.

Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which from our own experience forbid a reliance of this kind are too recent to permit us to be the dupes of such suggestion . The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of late war, have, by their valor on numerous occasions, erected eternal monuments to their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have

been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

All violent policy, contrary to the natural and experienced course of human affairs, defeats itself. Pennsylvania at this instant affords an example of truth of this remark. The Bill of Rights of that State declares that standing armies are dangerous to liberty, and ought not be kept up in time of peace. Pennsylvania, nevertheless, in a time of profound peace from existence of partial disorders in one or two of her counties, has resolved to raise a body of troops; and in all probability will keep them up as long as there is any appearance of danger to the public peace. The conduct of Massachusetts affords a lesson on the same subject, though on different ground. That State (without waiting for the sanction of Congress, as the articles of the Confederation require) was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival

it is full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the bands of the representatives of the people. This is the essential, and, after all, the only efficacious security for the rights and privileges of the people which is attainable in civil society.

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government and which against the usurpations of the national rulers may be exerted with infinitely better prospect of success that against those of rulers of an individual State. In a single State, if the persons intrusted with supreme power become usurpers, the different parcels,

subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy it will be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

The obstacles to usurpation and the facilities of resistance increase with the increased extent of the state, provided the citizens understand their rights and are disposed to defend them. The natural

strength of the people in a large community, in proportion to the artificial strength of the government, is greater than in a small, and of course more competent to a struggle with the attempts of the government to establish a tyranny. But in a confederacy the people, without exaggeration, may be

of the States will naturally reduce themselves within a very narrow compass; and in the interim, the United States will, in all probability, find it convenient to abstain wholly from those objects to which the particular States would be inclined to resort.

To form a more precise judgment of the true merits of this question, it will be well to advert to the proportion between the objects that will require a federal provision in respect to revenue, and those which will require a State

provision. We shall discover that the former are altogether unlimited, and that the latter are circumscribed within very moderate bounds. In pursuing this inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. It is true, perhaps, that a computation might be made with sufficient accuracy to answer the purpose of the quantity of revenue requisite to discharge the subsisting engagements of the Union, and to maintain those establishments which

for some time to come, would suffice in time of peace. But would it be wise, or would it not rather be the extreme of folly to stop at this point, and to leave the government intrusted with the care of the national defence in a state of absolute incapacity to provide for the protection of the community against future invasions of the public peace, by foreign war or domestic convulsions? If, on the contrary, we ought to exceed this point, where can we stop, short of an indefinite power of providing for emergencies as they may arise? Though it is easy to assert, in general terms, the possibility of forming a rational judgment of a due provision against probable dangers, yet we may safely challenge those who make the assertion to bring forward their data, and may affirm that they would be found as vague and uncertain as any that could be produced to establish the probable duration of

279
other. The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the defended by it.

9. "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would

have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed. *Perhaps*, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation that in many of the

States it had received no higher sanction than a mere legislative ratification. The principle of reciprocality seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty

The Federalist Papers

68

Confederacy. Frequent war and constant apprehension , which require a state of constant preparation, will infallibly produce them. The weaker States, or confederacies, would first have recourse to them to put themselves upon an equality to supply the inferiority of population and resources by a more regular and effective system of defense, by disciplined troops, and by fortifications. They would, at the same time, be necessitated to strengthen the executive arm of government, in doing which their

constitutions would acquire a progressive direction towards monarchy. It is of the nature of war to increase the executive at the expense of the legislative authority.

The expedients which have been mentioned would soon give the States, or confederacies, that made use of them a superiority over their neighbors. Small states, or states of less natural strength, under vigorous governments, and with the assistance of disciplined armies, have often triumphed over large states, or states of greater natural strength, which have been destitute of these advantages. Neither the pride nor the safety of the more important States, or confederacies, would permit them long to submit to this mortifying and adventitious superiority. They would quickly resort to means similar to those by which it had been effected, to reinstate themselves in their lost pre-eminence. Thus we should, in a little time, see established in every part of this country the same engines of despotism which have been the scourge of the old world. This, at least, would be the natural course of things; and our reasoning will be the more likely to be

just in proportion as they are accommodated to this standard.

These are not vague inferences drawn from supposed or speculative defects in a Constitution, the whole power of which is lodged in the hands of a people, or their representatives and delegates, but they are solid conclusions drawn from the natural and necessary progress of human affairs.

It may, perhaps, be asked, by way of objection to this, why did not standing armies spring up out of the contentions which so often distracted the ancient republics of Greece? Different answers, equally satisfactory, may be

constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American contributions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of

powers, may do not only what their powers do not authorize, but what they forbid. If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitutions It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. *The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs belongs to them to ascertain its meaning, as well the meaning of any particular act proceeding from the legislative body. If

there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought lo be preferred to the statute, the intention of the people to the intention of their agents.
Nor does this conclusion by any means suppose, a superiority

of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather

than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the prov-ince of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give preference to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the

direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure.

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